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FOR

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1941.

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ALSO DECISIONS IN THE

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JUDGES

OF THE

PROBATE, DIVORCE, AND ADMIRALTY DIVISION

OF

THE HIGH COURT OF JUSTICE.

1941.

Sir F. B. Merriman, President.

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CASES

DETERMINED BY THE

PROBATE, DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

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Divorce — Insanity — Care and treatment — Irregular detention in "workhouse" institution—Absence of requisite certificate by medical officer of the workhouse—Matrimonial Causes Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 57) *s.* 2 (*d*) ; *s.* 3—*Lunacy Act,* 1890 (53 *Vict. c.* 5), *s.* 25 ; *s.* 27, *sub-s.* 2 ; *s.* 38, *sub-s.* 4—*Lunacy Act,* 1891 (54 *&* 55 *Vict. c.* 65), *s.* 7.

A wife, incurably of unsound mind, was in 1935 discharged relieved, but not recovered, from a mental hospital under s. 25 of the Lunacy Act, 1890, for the purpose of her being detained at an institution technically a "workhouse" within the meaning of that Act, but the further statutory requirement under the same section that the medical superintendent of the latter institution should issue a certificate to a certain effect was not complied with.

In 1939 the husband petitioned for the dissolution of his marriage on the ground that the wife was incurably of unsound mind and had been under care and treatment for at least five years continuously immediately preceding the presentation of the petition within the meaning of ss. 2 (*d*) and 3 of the Matrimonial Causes Act, 1937, having been under detention continuously in the two institutions since 1923 :—

Held, (1) that the detention in the "workhouse" was not

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justified, owing to the lack of any certificate by the medical officer of that institution, and that the petition therefore failed ;

(2.) That had the provisions of s. 25 been fully complied with, the detention of the respondent would have been made under the original reception order and the two certificates provided for in s. 25 so as to be detention under an order as prescribed by s. 3 of the Act of 1937 ; but that even though this would have originally been so the reception order would have ceased to operate as soon as the periodical report and certificate required by s. 38, sub-s. 4, of the Lunacy Act, 1890, as amended by s. 7 of the Lunacy Act, 1891, ceased to be made.

Decision of Sir Boyd Merriman P. ([1940] P. 194) affirmed on the first point but reversed on the second point.

APPEAL from the President (Sir Boyd Merriman). (1)

On August 16, 1923, the respondent, Florence Emma Murray, was admitted into Bexley Mental Hospital as a pauper lunatic under a reception order. She remained there until June 19, 1935, when she was discharged, relieved, but not recovered, from Bexley Mental Hospital to the Leavesden Institution, Abbot's Langley, Hertfordshire, which is technically a "workhouse" within the meaning of the Lunacy Act, 1890. The discharge was carried out under s. 25 of that Act (2) by a certificate to the effect that in the opinion of the medical superintendent the respondent was a proper person to be kept in a workhouse as a patient of unsound mind. The requirement of the same section that the medical officer of the institution into which the patient was received must give a certificate as to the matters specified in the same section was not complied with by the Leavesden Institution, owing

(1) [1940] P. 194.

(2) The Lunacy Act, 1890 (53 Vict. c. 5), s. 25, provides as follows : "Where a pauper lunatic "is discharged from an institution "for lunatics, and the medical "officer of the institution is of "opinion that the lunatic has not "recovered and is a proper person "to be kept in a workhouse as a "lunatic, the medical officer shall "certify such opinion, and the "lunatic may thereupon be re-"ceived and detained against his "will in a workhouse without "further order if the medical "officer of the workhouse certifies "in writing that the accommoda-"tion in the workhouse is sufficient "for the lunatic's proper care and "treatment, separate from the "inmates of the workhouse not "lunatics, or that the lunatic's "condition is such that it is not "necessary for the convenience of "the lunatic, or of the other "inmates, that he should be kept "separate."

to a misapprehension. Further, no periodical report and certificate of the medical officer such as are required under s. 38, sub-s. 4, of the Act of 1890 as amended by the Lunacy Act, 1891, s. 4, to keep a reception order on foot were made after the transfer to Leavesden.

In 1939 the respondent's husband, John Thompson Murray, petitioned for the dissolution of his marriage with the respondent, alleging in pursuance of s. 2 (*d*) and s. 3 (1) of the Matrimonial Causes Act, 1937, that his wife was incurably of unsound mind and had been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition. Through her guardian ad litem, the Official Solicitor, the respondent denied the allegation.

The President found on the evidence that the respondent was incurably of unsound mind. Even if all the statutory requirements of s. 25 of the Lunacy Act, 1890, had been complied with, the patient was not in his view detained after her transfer to Leavesden Institution under any "order" under the Lunacy Acts. That section assumed discharge from the institution in which the patient was detained under a reception order; and the section afforded authority for further detention against the patient's will in a workhouse without a further order, provided that the requirements of the section were complied with. It was true that no mention was made of a discharge of the reception order, but when "discharge" is used in connection with the patient, that meant discharge from detention under a reception order. If a reception order was in force, it expired unless from time to time the prescribed continuation procedure was carried out under s. 38, as amended

(1) The Matrimonial Causes Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 57), s. 2 (*d*), provides that a petition for divorce may be presented on the ground that the respondent "is incurably of unsound mind "and has been continuously under "care and treatment for a period "of at least five years immediately "preceding the presentation of "the petition."

Sect. 3 provides that such a person of unsound mind "shall "be deemed to be under care and "treatment while he is detained "in pursuance of any order or "inquisition under the Lunacy and "Mental Treatment Acts, 1890 "to 1930 . . . . and not other-"wise."

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by s. 7 of the Lunacy Act, 1891. Nothing of the sort was required after the procedure laid down in s. 25 of the Act of 1890 had been complied with. He did not think it possible to say that the original reception order survived the discharge of the patient from the institution in which she was detained under that order; it followed that from the moment that s. 25 came into play, the authority for the detention was to be found in the section and was not based on any order. It followed that after the transfer to Leavesden Institution the respondent could not be treated as under "care and treatment" within s. 2 (*d*) of the Matrimonial Causes Act, 1937, in view of the provision of s. 3 that a person of unsound mind was to be deemed to be "under care and treatment while he is detained in pursuance of any order . . . . under the Lunacy and "Mental Treatment Acts, 1890 to 1930." But, if he were wrong as to this, the detention in the "workhouse" was not justified owing to the lack of any certificate by the medical officer of that institution. A certificate under s. 25 of the Act of 1890 by the medical officer of the workhouse was a condition precedent to the lawful detention of a patient in such an institution. Assuming then that if s. 25 had been complied with, detention would have been made under an order within s. 3 of the Matrimonial Causes Act, 1937, he must hold that the detention had not been justified for lack of the certificate of the medical officer of the workhouse. He was therefore bound to dismiss the petition.

The husband appealed. The appeal was heard on October 23, 1940.

Noel Middleton K.C. and *F. E. Sugden* for the appellant. The President was satisfied that the respondent was incurably insane and the only question is whether she has been "under "care and treatment" for five years preceding the date of the petition so as to satisfy s. 2 of the Matrimonial Causes Act, 1937. This term has the meaning given to it in s. 3, namely, that the person of unsound mind shall have been "detained in pursuance of any order . . . . under the Lunacy "and Mental Treatment Acts, 1890 to 1930." This was

clearly so while the patient remained at Bexley Mental Hospital. The transfer to Leavesden Institution, which was a "workhouse" within s. 341 of the Lunacy Act, 1890, by reason of its being an asylum provided under the Metropolitan Poor Act, 1867, was intended to be effected under s. 25 of the Act of 1890. The reception order remained in force while the patient remained at Bexley Mental Hospital by reason of the periodic reports and certificates given by the medical officer under s. 38, sub-s. 4, of the Act of 1890, as amended by s. 7 of the Lunacy Act, 1891. The last of these was given on July 17, 1930, and but for the transfer made in 1935 under s. 25 must have been given again a little later in that year. No such report and certificate were made after the transfer to Leavesden.

It is said that the failure of the medical officer at Leavesden to give the second of the two certificates required by s. 25 resulted in the respondent having been improperly detained in custody without her consent at this institution. The respondent was discharged, relieved, to Leavesden on the authority of two of the sub-committee of visitors and it was so stated in a notice of discharge given by the clerk to the hospital to the Board of Control. And as the medical superintendent gave the certificate required by s. 25 on the same day, that is sufficient to validate the transfer to Leavesden. The missing certificate of the medical officer of Leavesden was in the nature of a procedural matter and not a matter of necessity. This receives confirmation from the language of the Mental Treatment Act, 1930, s. 19, sub-s. 1, which enables pauper lunatics to be removed to any of certain hospitals instead of to a "workhouse" under the like conditions and subject to the "like procedure." The absence of this certificate does not affect the validity of the transfer under s. 25. The first certificate, which was duly given, was for the protection of the lunatic, and the second, which was not given, was for the protection only of the authority providing the workhouse.

The President has, however, held that, even if the transfer was valid, the respondent ceased to be detained under an

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order after that transfer. In fact the reception order remained in force after the transfer. Sect. 4 of the Lunacy Act, 1890, provides that no one can be detained except under a reception order, and that the reception order remained in force after the transfer to Leavesden is made clear by s. 37, sub-s. 2, of the Act, which provides: "if a patient . . . . is transferred "from one place of confinement to another, the original order "and certificate or certificates upon which he was received "shall remain in force."

[CLAUSON L.J. If that were so, would not the periodical certificate provided for in s. 7 of the Lunacy Act, 1891, need to be given in order to keep the reception order in force?]

When once a transfer is effected under s. 25 the periodical certificates cease to be necessary. The procedure under s. 25 is substituted for the periodical certificates otherwise necessary. The alternative view is that the procedure under s. 25 provided the order under which the respondent was detained.

Holroyd Pearce for the Official Solicitor. The view taken in the department dealing with lunacy is that no periodical certificates are required when once the procedure under s. 25 of the Act of 1890 is resorted to. It is difficult to support this view. Sect. 25 gives clear authority for the detention of a pauper lunatic transferred to a workhouse when the requisite certificates have been given, and it is hard, therefore, to say that these do not constitute a reception order, and a reception order has to be kept on foot by periodical continuation certificates. The same view would apply if on the true view the original reception order continues on foot after a transfer under s. 25. It would follow that in either case the reception order ceased to operate for want of the proper continuation certificates. Sect. 37, sub-s. 2, and s. 38, sub-s. 3, deal only with removals from one asylum to another and only then provide for the continuance of the original reception order. They can have no application to a transfer to a workhouse under s. 25.

[SIR WILFRID GREENE M.R. May it not be that the transfer is effected under the original reception order and the two certificates?]

That may be so, and, if so, it affords a ground for saying that no continuation certificates are required.

However that may be, it is understood that the Court takes the view that s. 25 has not been complied with.

Noel Middleton K.C. replied.

SIR WILFRID GREENE M.R. This is a case of great hardship, and much though I sympathize with the present appellant, all I can do is to administer the law as enacted by Parliament, and according to the best of my understanding. Before I deal with the case I would like to express on behalf of my brethren and myself our thanks to counsel and solicitors who have appeared and acted for the appellant, who is a poor person, giving their services gratuitously, and thereby enabling his case to be properly and skilfully presented to the Court.

The appeal is an appeal from a judgment of the President of the Divorce Division dismissing the petition for dissolution of marriage by the appellant. The appellant's wife on August 16, 1923, was admitted to Bexley Mental Hospital under a reception order dated August 15, 1923. She is and has for years been an incurable case. About that there is no dispute, and the learned President so found, and but for the difficulties to which I shall have to refer, the appellant has satisfied that part of s. 176 of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by the Matrimonial Causes Act, 1937, which gives the right to a decree for dissolution of marriage in the case of a spouse who is incurably of unsound mind. That part of the section is complied with. On June 19, 1935, the wife was moved from Bexley Mental Hospital, which is one of the county council institutions, to another institution conducted by that council, namely, Leavesden Mental Hospital.

The difficulties in the case arise from the manner in which that removal, that transfer, from the one institution to the other took place, and in what has happened since. Now the Legislature in passing the Matrimonial Causes Act, 1937, required in the case of persons incurably of unsound mind, that they should have been continuously under care and

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treatment for a period of at least five years immediately preceding the presentation of the petition. If the section had said no more than that, that requirement would have been amply satisfied, but s. 3 of the Matrimonial Causes Act, 1937, proceeds to say that a person of unsound mind shall be deemed to be under care and treatment in certain specified circumstances "and not otherwise." The circumstances relevant to the present case are thus stated in the opening words of sub-para. (*a*) of that section, which are as follows: "While he is detained in pursuance of any order or inquisition "under the Lunacy and Mental Treatment Acts, 1890 to "1930." Accordingly, before the appellant can succeed, he must show that his wife had continuously for at least five years immediately preceding the presentation of the petition been detained in pursuance of an order—I need not repeat the word "inquisition," which does not apply here—under the Lunacy and Mental Treatment Acts, 1890 to 1930. Now the machinery of the Lunacy and Mental Treatment Acts is complicated and technical. The safeguards which the Legislature has laid down in those Acts, in order to ensure that detention on the ground of lunacy or something short of lunacy shall only take place in proper cases, are strict, and unless they are strictly observed, the detention of an alleged lunatic is illegal. Accordingly, when the Legislature laid down this stringent test, which must be satisfied before a person can be said to be under care and treatment, it is required that those measures shall be carried out according to the letter of the law. This case shows and other cases have shown that those measures under the Lunacy and Mental Treatment Acts in the case of pauper lunatics are very frequently—and I speak from some experience—not strictly carried out. Sometimes it happens through an oversight, and sometimes it happens through carelessness: sometimes it happens, as we are told in this class of case it has happened, through a misapprehension as to the legal obligation; but I cannot doubt that there are many cases of pauper lunatics where, owing to some failure to put the proper machinery strictly into operation, a spouse will be deprived of the benefit

of the Matrimonial Causes Act and will be unable, on what very often must be a highly technical ground, to obtain relief. In the present case we are told that there has been a certain view taken as to the requirements of the Acts in cases of this kind. That view, which I shall refer to presently, in my opinion, is a mistaken view. The fact that it has been taken and widely held must mean, if my opinion is right, that there are many, many cases where the Matrimonial Causes Act, for a technical reason and for no reason of substance, will fail to operate, and it may well be that the Legislature will think it right to take that matter into consideration, if and when an amendment of that Act comes to be considered.

Now the original order of August 15, 1923, was a reception order made by justices in the proper way, and had the wife remained under that order at the Bexley Mental Hospital, no question could have arisen. Periodical certificates are required in order to keep a reception order in force under s. 7 of the Lunacy Act, 1891, which substitutes a new sub-s. 4 for the original sub-s. 4 of s. 38 of the Act of 1890. That sub-section requires that at stated intervals beginning with a year and running up to five years, there must be a special report of the medical officer of the institution as to the mental and bodily condition of the patient, with a certificate certifying that the patient is still of unsound mind and a proper person to be detained. Unless these reports and certificates are given, the reception order automatically expires. That is one of the safeguards which the Legislature has laid down for the benefit and protection of persons detained under reception orders, and one would not expect to find that the Act would allow any case to exist where a person detained as an alleged lunatic could be detained indefinitely without the necessity of periodical reports and certificates. In the present case the reports and certificates required by that sub-section were duly given, and if the patient had remained at Bexley, a further report and certificate would have been due on July 17, 1935, on which date the first five-yearly period expired. That transfer to Leavesden, however, took place about a month before the time arrived for making that

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report and giving that certificate. On June 19, 1935, the clerk of the Bexley Mental Hospital sent to the Board of Control a notice, and we take it that that notice correctly states the facts. It gave notice that the patient was discharged, relieved under s. 25 to Leavesden Mental Hospital annexe. On June 19, 1935, the discharge was effected on the authority of two of the sub-committee of visitors, and there is a certificate bearing the same date by a doctor, I apprehend, who was acting for the medical superintendent of the hospital, headed: "Lunacy "Act, 1890, Sec. 25, and Mental Treatment Act, 1930, Sec. 19," certifying that the patient had not recovered, and that the doctor signing it was of the opinion that she was a proper person to be kept in a workhouse or hospital as a patient of unsound mind. Now it is clear, and no suggestion can I think be made to the contrary, that the authorities were intending to put into operation the machinery laid down under s. 25 of the Lunacy Act, 1890. [His Lordship read the section, and proceeded:]

Now, this institution at Leavesden is admittedly a workhouse within the definition of that word contained in s. 341 of the Lunacy Act, 1890. It is an asylum provided for the reception and relief of the insane under the Metropolitan Poor Act, 1867. It is not a workhouse in the more popular sense of the term, in that it does not contain the normal persons who are to be found in workhouses by reason of misfortune or otherwise, and have to be maintained in these institutions without any question of their being of defective intelligence; in other words, it is a place confined to the reception of persons who either are lunatics or can lawfully be confined owing to some mental defect. Now, that being so, it would appear that the certificate which the medical officer of the workhouse is required by the section to give, is not a thing which in such cases would serve any particularly useful purpose. Nevertheless, in my opinion, in order that a pauper lunatic may be received and detained in a workhouse under that section, it is necessary that all the three matters referred to in the section should come into operation: there must be a discharge from the institution; there must be the

opinion of the medical officer (the medical officer of the institution) and his certificate ; and there must be the certificate of the medical officer of the workhouse. When these three matters are all there, they have the effect of justifying in law the reception and detention in the workhouse, and moreover, in my judgment, where those measures are properly carried out, there is no gap or interval of time during which it could be said of the pauper lunatic that he was not being lawfully detained. He goes from the one institution to the other, and his detention in the new institution, and his transfer from the one to the other in pursuance of s. 25, would, in my opinion, all be lawful under the section. But if one or other of these three requirements is not satisfied, I cannot myself see how it can be said that the reception into the workhouse or the detention in the workhouse is justified. The original reception order, on any view, according to its terms and apart from special provisions in the Act, only justifies the detention of a lunatic in the specified institution. In order that the lunatic's detention in another institution may be justified, some other provision of the Act must be relied upon, and, accordingly, if it is intended to put s. 25 into operation and it is not properly put into operation, the detention of the lunatic in the workhouse is unlawful.

If that construction of the section be right, and in my opinion it is right, it is impossible to say of this patient that she was detained in pursuance of an order at any moment of time after she left the Bexley Hospital. She was not being lawfully detained under the original reception order because that specified and only applied to Bexley. She was not being lawfully detained under s. 25 because that section had not been complied with.

We are told that a different and, in the result, a misconceived view was taken by the authorities as to the meaning of s. 25, but I find myself in complete agreement with that part of the learned President's judgment which gives that reason as the reason for dismissing the petition. The medical officer of the workhouse gave no certificate as required by the section, and the absence of that certificate, in my opinion, makes it

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impossible to rely on that section as justifying the detention of the patient.

That is enough really to dispose of this appeal, but the learned President put as his first reason for dismissing the petition the opinion that in a case where s. 25 had been put into operation, even if the necessary certificates both of the medical officer of the original institution and of the medical officer of the workhouse had been given, even where that had taken place, it would not be possible to say that the detention in the workhouse was pursuant to an order, his view being that the original reception order went, that the detention in the workhouse would be not by virtue of that order because it had gone nor by virtue of any other order because s. 25 does not provide for an order, and as s. 3 of the Matrimonial Causes Act, 1937, confines the operation of the relevant provision to cases where the person of unsound mind is detained in pursuance of an order, it must follow, according to his view, that where s. 25 applies the Matrimonial Causes Act could never operate, because there never can be an order. Now that, of course, is a far-reaching decision, and would cut down very substantially the operation of the relevant provisions of the Matrimonial Causes Act. With all respect to the learned President, I do not myself take that view. It seems to me that where s. 25 has been put into operation properly, where the three requirements of s. 25 have been fulfilled, and a pauper lunatic is taken—I will not use the word "removed" for a particular reason—from the original place of detention to the workhouse, that the original reception order continues to have effect. I say that because s. 37, sub-s. 2, of the Lunacy Act, 1890, provides that if a patient is transferred from one place of confinement to another, the original order and certificate, or certificates, upon which he was received shall remain in force.

Now I beg to observe that the word used is "transferred." It is not the word "removed." If it had been the word "removed," it would probably have been necessary to confine the operation of the sub-section to cases of removal which are dealt with in a fasciculus of sections in the Act,

beginning with s. 58. That fasciculus is headed "Removal "of lunatics," but the word is "transferred" from one place of detention to another. Now it seems to me that that word "transferred" is not a technical word having a special meaning in the Lunacy Acts, but is a word of general import which applies on its true construction to such a process as is contemplated by s. 25. That is exactly what happens under s. 25. The patient is transferred from the original institution to the workhouse, and the justification for the transfer is the putting into effect of the machinery laid down in s. 25. Therefore, a person to whom s. 25 has been properly applied would, in my view, after transfer to the workhouse, be detained by force of the original reception order, coupled with the certificates granted under s. 25.

In the present case that view does not avail the appellant, because the reception order, in order to maintain its validity, requires the periodical report and certificate of the medical officer to which I have referred earlier in this judgment. No such certificate was given. There again, we are told that the omission to give that certificate was due to a different view which the authorities have in many, if not in all cases, taken as to the operation of these rather complicated sections.

Giving the matter the best consideration that I can, I am of opinion, as I have said, that the original reception order retains its force, and that order, coupled with the certificates, forms the justification on which the persons in charge of the institution would have to rely, if, for instance, a writ of habeas corpus was sought against them by a person saying that he was illegally detained.

There is a further argument in favour of that view to which I may refer. I cannot bring myself to believe that under the Lunacy Acts a pauper lunatic who happens to have been transferred to a workhouse is given less protection than he had before he was transferred to the workhouse. When she was at Bexley, this patient had the protection of the requirement for periodical reports and certificates. It would be a strange thing if immediately on transfer to the workhouse she could be lawfully detained for the rest of her life without the

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necessity of some such periodical review and report as to her condition. The effect of the Act would be, if my view be correct, that that result would not follow, because the obligation to maintain the original reception order in force by the periodical reports and certificates would remain and would continue, would be carried over from the old régime at Bexley to the new régime of the workhouse. Another view has been canvassed in the course of the argument of the case, and that is that the original order does not remain in force, but that the certificates given under s. 25 are, by virtue of the definition clause in the Act of 1890, themselves reception orders, or constitute a reception order. The definition of that phrase in s. 341 of the Act is as follows: "'Reception order' "means an order or authority made or given before or after the "commencement of this Act for the reception of a lunatic, "whether a pauper or not, in an institution for lunatics or "as a single patient, and includes an urgency order." Now the view that the certificates by definition are a reception order, were it correct, would lead, I think, to the conclusion that they would constitute an order within the meaning of s. 3 (*a*) of the Matrimonial Causes Act, 1937, but be it observed that if that were the true view, the present appellant nevertheless could not succeed, because though they were reception orders, then as from their date, which was June 19, 1935, the necessity for periodical reports and certificates would exist, and the effect would be that the first report would have to be given, not after five years as would otherwise have been the case in the present instance, because that was the appropriate period having regard to the time she had been there, but after one year, and would start again with one year, two years, three years, and so up to five years. No such reports or certificates were given in this case. So even if that view be correct, the petitioner must fail, but my reason for preferring the view that the order is to be found under the original reception order lies in the fact that to find the reception order in s. 25 would mean starting these periods afresh, for which there appears to be no logical reason at all, whereas if the original reception order is carried over into the new régime,

the periodical reports and certificates are also, so to speak, carried over according to whatever would be the appropriate interval of time. That seems to me to be a much more logical and sensible construction of the Act, and it fits in with the view which I have formed as to the true meaning of s. 37, sub-s. 2.

I have dealt at some length with that aspect of the case, because I am there differing from one of the learned President's reasons, and although I agree with him entirely on the view which he took on the other part of the case, I am unable, with great respect, to accept his reasoning on that point. I prefer the view which I have stated, with the result that the appeal must be dismissed, though I dismiss it, as I have already said, with great regret.

CLAUSON L.J. I concur in all the observations that have fallen from my Lord in regard to the construction of the Act, and accordingly in the conclusion to which he has come, and I will therefore confine myself to saying that I agree that the appeal must be dismissed.

GODDARD L.J. I agree.

Appeal dismissed.

Solicitors: *Simmons & Simmons: Official Solicitor.*

H. C. G.

1940
Nov. 5.

IN THE ESTATE OF SANPIETRO, DECEASED.

IN THE ESTATE OF VAN TUYLL VAN SEROOSKERKEN, DECEASED.

Probate—Practice—Enemy interests in estates in England—Grants of administration ad colligenda bona to Public Trustee—Motion in Court when special powers required—Trading with the Enemy Act, 1939 (2 & 3 *Geo.* 6, *c.* 89), s. 15, *sub-s.* 1 (*a*)—*Supreme Court of Judicature (Consolidation) Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 162—*Administration of Justice Act*, 1928 (18 & 19 *Geo.* 5, *c.* 26), *s.* 9.

Applications by the Public Trustee for simple grants of letters of administration ad colligenda bona in the case of estates in England where there is an enemy interest may be made in the Principal Probate Registry on affidavit. Where special powers are required the appropriate procedure is by motion in open Court.

In the first case two Italian nationals acquired reversionary interests in an English trust fund on the death of their mother, a British-born Italian national. The Public Trustee was given a grant of administration ad colligenda bona, and empowered to reimburse the solicitors who had acted as attorneys for the two reversioners in respect of the estate duty which they had paid and of their costs.

In the second case a Dutch national died in England domiciled in Holland. The executor named in his will was his brother, who was still resident in Holland, in enemy occupation. The Public Trustee was granted letters of administration ad colligenda bona and empowered to pay certain debts and funeral expenses, and also to pay to the widow of the deceased the income from the residue as provided by the will, subject to the sanction of the Trading with the Enemy branch of the Treasury and the Board of Trade.

MOTION for administration ad colligenda bona.

In the first case the Public Trustee sought a grant of administration ad colligenda bona in respect of a trust fund in England of about 3700*l.* which, on the death of Signora Ina Fanny Sanpietro, an Italian national, born in England, devolved on her two surviving children. The latter were Italian nationals and therefore enemy aliens.

The Public Trustee made a similar application in respect of personal estate, worth about 12,000*l.*, of Baron van Tuyll van Serooskerken, a Dutch national, who died in England,

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domiciled in Holland. The executor named in his will was his brother, who was resident in Holland, enemy-occupied territory.

Victor Russell, for the Public Trustee. On these motions it may be convenient to trace the steps taken by the authorities in connection with estates which on the death of certain people are found in one way or another to attract enemy interests. Sect. 7 of the Trading with the Enemy Act, 1939, empowered the Board of Trade to appoint Custodians of Enemy Property in England, Scotland and Northern Ireland, and in September, 1939, Sir Ernest Fass, the Public Trustee, in his private capacity was appointed Custodian in England. By a general order dated September 16, 1939, made by the Board of Trade (St. R. & O. 1939, No. 1198) it was provided that all money which would but for the war be payable to or for the benefit of an enemy should be paid to the Custodian either within fourteen days after the order came into force, or within fourteen days of the date upon which the money became payable, or within fourteen days after the day on which a person became an enemy; also all persons who held or managed property for or on behalf of the enemy were required to furnish the Custodian with such returns and information as he might desire.

The Board of Trade has power to vest enemy property in the Custodian under s. 7, sub-s. 1, of the Trading with the Enemy Act, 1939, and the fees to be retained by the Custodian are 2 per cent. of the amount paid to him and of the value at the date of vesting of any property vested in him or of which the right of transfer is vested in him. Sir Ernest Fass was appointed Custodian in his personal capacity and not in his corporate capacity as Public Trustee under the Public Trustee Act, 1906. Thus the position now differs considerably from that in the war of 1914-1918, when the Trading with the Enemy Amendment Act, 1914, s. 1, sub-s. 2, constituted the Public Trustee (a corporation sole under the Public Trustee Act, 1906) the Custodian for England and Wales, and provided that as Custodian of Enemy Property he should have the same powers as he had as Public Trustee, including of course the power

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to accept grants of administration to the estates of deceased persons. The decisions in *In re the Estate of Jacob Schiff* (1) and *In re the Estate of Ladislaus Otto Grundt* (2) were relevant to the practice adopted during that war in respect of grants issued to the Public Trustee as Custodian in cases where persons entitled to the assets of deceased persons were enemies.

Under the Trading with the Enemy Act, 1939, the Custodian of Enemy Property has no power to accept grants of administration to the estates of deceased persons where enemy interests are involved. Therefore it has been suggested that at the Custodian's request the Public Trustee, as a corporation sole, should apply for grants of administration ad colligenda bona when the Custodian deems it necessary. There is some objection to the acceptance by the Public Trustee of unlimited grants of administration in cases where the person dies domiciled abroad, because questions of foreign law may be involved in administering such estates, but these objections do not apply to grants ad colligenda bona. The Public Trustee is willing to accept grants in the limited form which I have indicated, subject to such special directions as the Court may make, and this procedure would save the possible necessity for amending legislation or additional general orders by the Board of Trade under the existing Act. This course may also save the need for new grants to successors on the retirement or death of a Custodian and avoid duplication in the Custodian's office of the staff and organization already existing in the Public Trustee's office for dealing with this class of work.

If grants ad colligenda bona are thus made to the Public Trustee in cases where no other representation can be obtained and enemy interests are involved, it will also assist the Inland Revenue authorities in the collection of outstanding death duties, and ensure the preservation of that part of any estate which represents enemy interests. In about the year 1922 the then President of the Probate Division directed that procedure by motion for grants of administration to the Administrator of German Property might be dispensed with, and that such grants might be issued from the Registry on

(1) [1915] P. 86. (2) [1915] P. 126.

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proper evidence by affidavit of the applicant's interest in seeking a grant. I respectfully submit, on behalf of the Public Trustee, that in the present war he should be enabled to obtain such grants in the Registry on evidence by affidavit.

Merrylees for Baroness van Tuyll.

1940. Nov. 5. THE PRESIDENT (SIR BOYD MERRIMAN). In these two cases Sir Ernest Fass, in his capacity as Public Trustee, has moved the Court for grants ad colligenda bona. I emphasize the fact that he is applying as Public Trustee in both cases. In greater or less degree the interests of enemy aliens are involved. Sir Ernest Fass is in fact also Custodian of Enemy Property, but in the affidavit which he has put before the Court, he emphasizes that in that latter capacity he has no power to apply for grants of this kind. Nevertheless, the dual capacity occupied by him has many obvious advantages from the point of view of applications of this sort. About the propriety of making a grant ad colligenda bona to Sir Ernest Fass as Public Trustee there is really no dispute, nor could there very well be any dispute, but in both cases I am asked to modify the ordinary form of grant ad colligenda by giving to the Public Trustee certain extra powers.

Dealing with the matter quite generally first, it was plainly settled during the last war in the cases of *In re the Estate of Jacob Schiff* (1) and *In re the Estate of Ladislaus Otto Grundt* (2), that the circumstance that the executor or beneficiaries in an estate have become enemy aliens by reason of the outbreak of war is a special circumstance which entitles the Court to make a grant to the Public Trustee under s. 162 of the Judicature Act, 1925, or, as it then was, s. 73 of the Court of Probate Act, 1857. It is said that by virtue of s. 9, proviso (*b*), of the Administration of Justice Act, 1928, the Court has power to modify the strictness of a grant merely ad colligenda, and to give the Public Trustee limited powers, at any rate, of actual administration. The material words are: "If . . . . by reason of "other special circumstances, it appears to the Court to be "necessary or expedient to appoint as administrator some

(1) [1915] P. 86. (2) [1915] P. 126.

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"person other than the person who, but for this provision, "would by law have been entitled to the grant of administra- "tion, the Court may in its discretion, notwithstanding "anything in this Act, appoint as administrator such person "as it thinks expedient, and any administration granted under "this provision may be limited in any way the Court thinks "fit." Those words, of course, enable a creditor to obtain an unrestricted grant of administration. The effect of that obviously is that a creditor can retain his debt in the process of administration.

What is asked for here, however, is that the grant ad colligenda should be modified by enabling certain powers referable to administration to be exercised. I see no reason to doubt that, under words as wide as those that I have read, the Court has such power. If I can make a grant of administration pure and simple to the Public Trustee, though I am not invited to do so for reasons which are set out in his affidavit, it seems to me to be reasonably clear that I have power to modify the strictness of a grant ad colligenda in the way proposed.

If authority were needed for this proposition, I think it is to be found in the case of *In the Estate of Hans Fischer, deceased* (1), where Hodson J. made a grant of administration to a German national resident in this country, while at the same time limiting it by provisions that a return be made to the Custodian of Enemy Property and that no part of the estate or proceeds be transmitted to members of the family residing abroad. At any rate, I propose to accede to the application of the Public Trustee for a grant ad colligenda modified as I have said.

That brings me to the special circumstances of the two cases. In the first motion, *In the Estate of Ina Fanny Sanpietro*, I am dealing with an English woman who was married to an Italian in 1878. He died in 1891. The widow herself died intestate in March, 1939, before the entry of Italy into the war. She left two out of five children her surviving. She had by the death of the other three children become

(1) (1940) 56 Times L. R. 560; [1940] W. N. 130.

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entitled to certain property, and also under the will of her own father, an Englishman, she had a life interest in part of his estate now represented by investments amounting in value to about 3700*l.* These two surviving children, who had been born in England, and, as I understand, were resident in Milan, had also before the outbreak of war executed a power of attorney to certain English solicitors to obtain administration, and in the ordinary course of their business these solicitors had disbursed about 600*l.* in estate duty, and also had inevitably incurred certain costs. In addition to these costs which were incurred before the entry of Italy into the war, they have also incurred certain costs as preliminary and incidental to the bringing forward of this motion; those costs were incurred, of course, after Italy had entered into the war.

It is suggested that in this case I should give the Public Trustee power to reimburse to the solicitors the estate duty which they have paid, and the costs which they have incurred under both headings, both those incurred in the exercise of the power of attorney before Italy came into the war, and those which they have incurred as incidental to or preliminary to this application after the power of attorney had become void by virtue of the Trading with the Enemy Act, 1939. I see no reason at all why I should not grant these powers. I think in the circumstances of the case to do so is both appropriate and desirable, and I shall make an order accordingly.

In the other motion, *In the estate of Baron van Tuyll van Serooskerken, deceased*, I am dealing with a Dutch subject, formerly resident in Austria, but at the time of his death in January, 1940, resident in this country, though still domiciled in Holland. Without going into the whole history of the executorship, it is sufficient to say that at the time of his death the sole executor was a brother, resident in Holland, who survived him. By a power of attorney given in March, 1940, before the subjugation of Holland, this executor had appointed two London solicitors to be his attorneys to obtain administration. They also had paid the estate duty, and, as it happens, the papers were lodged at Somerset House, the estate

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duty having been paid, one day before the invasion of Holland began.

In this case the English property, worth about 12,000*l.*, goes under the will to the widow for life, and after her death to various beneficiaries including this executor and his children. There are beneficiaries who are not enemies within the meaning of the Trading with the Enemy Act, but the executor and his children are so tainted.

In these circumstances it is suggested that in this case the Public Trustee should have power to reimburse to various persons the payments that they have made in respect of the deceased's debts in this country, and in respect of the expenses of his illness, and his funeral expenses, the whole amounting to about 173*l.*, and to pay the widow, subject to the consent of the Trading with the Enemy branch of the Treasury and the Board of Trade, the income from the English estate, to which she is entitled for her life, and also to pay the solicitors' costs, whether incurred under the power of attorney before it was vacated, or as incidental to this motion.

Here, again, I think that the suggested modifications are right and proper. It is true that this is going a good deal further than in the other case, because it involves the payment of the whole of the income to the widow so long as the estate is subject to the provisions of the Trading with the Enemy Act; but in the circumstances I think that that is a proper provision. It may be that in the circumstances the consent of the Trading with the Enemy branch of the Treasury is a mere formality, but I think that that term should be imposed. I propose, therefore, to make a grant ad colligenda with these modifications, as set out in the affidavit of Sir Ernest Fass.

There is only one other point to be dealt with. Mr. Russell, on behalf of the Public Trustee, has invited the Court to say that in similar circumstances it should not be necessary to move the Court itself, but that application for grants ad colligenda, with or without modifications of the kind with which I have been dealing, should be made direct to the Principal Probate Registry on affidavit. I see no reason why applications for simple grants ad colligenda should not be

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so made, and I am prepared to rule that that shall be the appropriate procedure in future, but on reflection Mr. Russell agreed with me that that would not be the appropriate procedure where special powers are asked for. In those cases, as heretofore, the application should be made to a judge by motion in open Court.

In reply to the PRESIDENT, *Russell* said that the Public Trustee would be able to take his costs out of the estates.

HIS LORDSHIP made an order for the costs of Baroness van Tuyll to be paid out of the estate.

Solicitors: *Walbrook & Hosken and Walter J. Lark & Co., for the Public Trustee; Stileman, Neate & Topping, for Baroness van Tuyll.*

W. L.

Applied. MAYO *v.* MAYO. [1948] 2 All E.R. 869.

Not followed. PERRING *v.* PERRING. [1949] 2 All E.R. 334.

1940
Dec. 16, 20.

FRAMPTON *v.* FRAMPTON AND BUSHELL.

Divorce—Evidence—Wife's admissions that co-respondent was father of her child—Rule in Russell *v.* Russell.

Where in a husband's suit for divorce the only evidence of adultery was the wife's admissions that the co-respondent and not the husband was the father of her child, and there was no evidence of non-access by the husband, it was held that, despite the form of the statements, they were admissible as proof of adultery and not excluded by the rule in *Russell* v. *Russell* [1924] A. C. 687.

Warren v. *Warren* [1925] P. 107, and *Roast* v. *Roast* [1938] P. 8, followed.

UNDEFENDED SUIT for divorce.

In this suit Ernest John Frampton, a farm labourer, of Lydd, Kent, in October, 1939, petitioned for the dissolution of his marriage on the ground of the adultery of his wife, Elsie Ellen Frampton, with Arthur Bushell.

The marriage took place at Lydd parish church in September, 1932. In September, 1938, the husband left his wife because of her continued association with the co-respondent, and entered into a separation deed with her under which he allowed her 3*s.* 6*d.* a week. In December, 1938, she told him that she wanted a divorce and, when she was free to do so, would marry Bushell. In January, 1939, she again told him that she wished to be divorced, and that she was going to have a child of whom Bushell was the father. The child was born on May 30, 1939. She was confined at an institution at Chatham and for the purpose of her admission she had to make a statement in which she said that Bushell was the father of her child. She made the same statement to a public assistance official.

There was no evidence of an adulterous association between the wife and the co-respondent, or of non-access by the husband.

S. Lyttleton Howes (*J. Bavington Jones*, on war service), for the petitioner.

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FRAMPTON v. FRAMPTON AND BUSHELL.

1940. Dec. 20. HODSON J. In this case there is no evidence of adultery at all, except admissions made by the wife in the form of statements that the co-respondent and not the husband was the father of her expected child. These statements were made not only to the husband, but also to a public assistance officer, who saw her and gave evidence of that fact. The question is whether the form of those admissions rendered them inadmissible, in view of the decision of the House of Lords in *Russell* v. *Russell* (1). On this point I was referred to the decision of Swift J. in *Warren* v. *Warren* (2). The head-note is: "A "wife's admission that she had committed adultery, even if "accompanied by a statement of her belief that a child, "subsequently born, was the result of the adultery, cannot "bastardize the child without evidence of the non-access of "the husband. The confession of the wife, therefore, that "she has committed adultery is admissible as evidence in a "suit for divorce so long as she does not assert that the "husband could have had no access at the time of conception." In that case there were apparently other admissions of adultery by the wife, besides statements by her to the effect that her pregnancy was due to intercourse with a man other than her husband.

Of course it can be argued that any admissions by a pregnant woman that she has committed adultery may tend to bastardize the child which she subsequently bears, but it appears to me that it does not make any difference in principle whether she says simply: "I have committed adultery," or "I am "pregnant by another man." That, I think, is what Swift J. was, in effect, saying. He says (3): "However many men "she has had connection with nothing can bastardize "the child unless non-access of or non-intercourse by the "husband can be proved. Her evidence and proof of her "conduct and statements are admissible unless and until it is "sought to prove by these means non-access or non-inter-"course."

(1) [1924] A. C. 687.
(2) [1925] P. 107.
(3) [1925] P. 112.

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Hodson J.

But no question of non-access or non-intercourse arises in this case and no attempt has been made to bastardize the child. The decision of Swift J. was followed by the Divisional Court in the case of *Roast* v. *Roast* (1), and more recently was referred to with approval by the Court of Appeal in the case of *Ettenfield* v. *Ettenfield* (2), where Goddard L.J., who delivered the judgment of the Court, expressly said that the Court desired to shed no doubt on the correctness of the decision in *Warren* v. *Warren* (3). I am satisfied that the statements made in this case, standing alone as they do, are admissible in evidence and, if true, are quite sufficient for me to rest a conviction of adultery upon them. They were made, as I have already stated, not only to the husband, but also to the public assistance officer, and I believe that they are true, and there will therefore be a decree nisi.

Decree nisi.

Solicitors: *Kingsford, Dorman & Co., for Kingsford, Flower & Pain, Ashford, Kent.*

(1) [1938] P. 8. (2) [1940] P. 96. (3) [1925] P. 107.

W. L.

HIGGS (A.) *v.* HIGGS (W.).

1941
Jan. 13.

Divorce—Evidence—Summary jurisdiction—Probation officer's report—Irregularity—Maintenance—Wife's means—Summary Procedure (Domestic Proceedings) Act, 1937 (1 *Edw.* 8 *and* 1 *Geo.* 6, *c.* 58), *ss.* 4, 5.

Sect. 4 of the Summary Procedure (Domestic Proceedings) Act, 1937, provides that if a probation officer has been unsuccessful in bringing about a reconciliation between husband and wife, parties to the proceedings, he may furnish to the Court statements of allegations made by the parties, if they consent, and information as to certain other matters; such a statement must be communicated to the parties, and may be used by the Court for the purpose of putting questions to witnesses, but nothing in it may be received by the Court as evidence.

Sect. 5 of the Act lays down procedure for an investigation by the probation officer into the means of the parties and empowers the Court to direct him to report the result of the investigation, but such direction is not to be given until after the Court has determined all other issues in the case. Such report must be brought to the notice of the parties present at the hearing and in the event of objection, though the statement by the probation officer is receivable in evidence, the Court shall require the probation officer to give evidence on oath.

In making a maintenance order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, a Bench of Justices received in evidence a report by the probation officer dealing with (1.) the possibility of reconciliation; (2.) the husband's intention to make proper provision for the wife; and (3.) the husband's means; without disclosing the report to the parties or giving an opportunity for cross-examination :—

Held, on appeal, whether the report was regarded in so far as it dealt with amount, as made under s. 5, or in so far as it dealt with merits, as made under s. 4, in neither case was the statute complied with in any particular. Contrary to s. 4 the report was received in evidence on the merits, and contrary to s. 5 the report was made on means before the merits had been determined. In neither case was either party given any opportunity of knowing what was in the report and exercising such rights as were given under the statute in respect thereof.

In a matrimonial case in the Summary Jurisdiction it is the duty of justices to take into account the means of a wife, including her earning capacity, in an appropriate case.

The order was discharged, and a re-hearing ordered.

APPEAL from a maintenance order made by the Becontree (Essex) Justices.

On June 1, 1940, Winnie Higgs, of Bemsted Road, Walthamstow, took out a summons under the Summary Jurisdiction

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HIGGS (A.) v. HIGGS (W.).

(Separation and Maintenance) Acts, 1895 to 1925, against her husband, Arthur Higgs, a joiner, of the same address, alleging wilful neglect to provide her and their two infant children with reasonable maintenance. They were married on August 4, 1927, at West Ham register office, and they had two children—sons, aged eleven and seven years. After hearing the evidence of both parties on June 12, 1940, the justices made a temporary order, stating their reasons as follows: "The justices were of the opinion that the matter "might be one with which the probation department could "adequately deal after hearing the evidence adduced. They "had in mind the two young children of the marriage. The "court was satisfied that there was wilful neglect by the "husband to provide reasonable maintenance, and, taking "all the circumstances into consideration, adjourned the "matter for two months, with a temporary order for the "payment to the wife of a weekly sum of 20*s*."

At the next hearing, on August 7, 1940, the justices held that the husband had wilfully neglected to provide reasonable maintenance, and ordered him to pay 25*s*. a week to his wife, together with 12*s*. a week for the two children, the custody of whom was granted to the wife.

The husband appealed on the following principal grounds: (1.) that there was no evidence of wilful neglect to maintain; (2.) that the justices had refused to take into account the fact that the wife had been earning her own living for over a year; (3.) that there were no grounds for making an order for the custody of the children, who were away from home under the Government Evacuation Scheme; and (4.) that despite the protests of the appellant's counsel, the justices received in evidence and read a report on the case by the probation officer without allowing counsel for the appellant to see it or cross-examine the probation officer thereon.

The relevant facts and the material sections of the Summary Procedure (Domestic Proceedings) Act, 1937, are fully set out in the judgments.

G. C. Dare for the appellant.

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Richard Merrylees (with him *G. C. Tyndale*) for the respondent.

1941. Jan. 13. THE PRESIDENT (SIR BOYD MERRIMAN). This is an appeal from a decision of the justices of the Becontree Division of Essex. The husband, who is the appellant, complains of a finding by those justices on August 7 last that he had been guilty of wilful neglect to maintain his wife on the strength of which the justices ordered a weekly payment of 25*s.* in her favour and 6*s.* each in respect of the two infant children, custody of whom was awarded to the wife.

The husband says that there was no ground for finding him guilty of wilful neglect to maintain; that there was no material, even if he was guilty of wilful neglect, on which an order for the sum of 25*s.* could be founded having regard to the wife's own means and earning capacity; there was no ground for awarding the custody of the children, having regard to the fact that the parties were living together at the time the order was made and the children had been evacuated to another place under the Government Evacuation Scheme; and that there was no ground for making any award of maintenance in respect of the children seeing that the husband was regularly paying the necessary billetting allowances to the proper person in respect of those children.

In addition to this comprehensive list of complaints against the order, the husband also says that the whole proceeding was bad on the face of it because the justices omitted to comply with the statutory directions imposed upon them by the Summary Procedure (Domestic Proceedings) Act, 1937, in connection with the reception of the probation officer's report.

In this latter respect, with which I propose to deal first, I think this case is of considerable public importance.

The case came on before the justices first on June 12, 1940. Having heard the evidence on both sides the justices said—as they were perfectly entitled to do—that the matter might be one which the probation department could adequately deal with, and accordingly they adjourned the case and made an interim order. They made it on a statement that

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they were satisfied that there was wilful neglect to provide reasonable maintenance by the husband.

The statutory authority for that procedure is to be found in s. 6 of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, which lays down that where there is an adjournment for any period exceeding a week the Court may order a sum not exceeding that which could be made under a final order for the maintenance of the wife and any child or children in her custody until the final determination of the case. That section does not exclude the sort of determination which the justices say they had already made; but it could, quite plainly, only be an interim determination. It not merely implies but expresses that it is the decision on the adjourned hearing which will be the final determination. So far the justices were acting strictly within their powers and rights. Indeed, nobody has suggested that they were acting otherwise than wisely in seeking the assistance of the probation officer.

On August 7 the matter came on again for what the statute describes as the final determination. On this occasion, however, very little evidence was taken; the evidence was confined to a line and a half in the justices' note of the evidence of the complainant herself. But it is common ground that the justices had before them a report in writing from the probation officer, and it is quite plain from the reasons given by the justices for their decision that that report dealt with two things: first, the prospects of reconciliation; secondly, the intention of the husband to make proper provision for the wife out of his earnings, which necessarily implies that it was some report as to his earnings and his means for making what is described as proper provision.

That brings me to a consideration of the Summary Procedure (Domestic Proceedings) Act, 1937, to which I have already referred. This Act made provision for a procedure which, unless authorized by statute, might appear to run counter to the system on which justice is administered in this country, namely, that nobody shall be condemned for any offence without the opportunity of hearing the evidence on which he is to be condemned. Although it is not necessary to go

into the reasons for any legislation, I have little doubt in my own mind that this Act was prompted by the fact that it was notorious that justices were, in fact, receiving reports from probation officers about the merits of cases before them without the parties having means of knowing what was being said about them. Accordingly, Parliament laid down in the clearest possible language a very strict code dealing with the matter. Sect. 4 deals with attempts to effect reconciliation by the probation officer and s. 5 deals with a probation officer's investigation into the matter of means. The procedure in the two cases is different and it is important to notice the distinction.

By s. 4 it is provided that where the court has requested a probation officer to attempt to effect a reconciliation between the parties the probation officer may, if the attempt has proved unsuccessful and he thinks fit in the circumstances of the case to do so, furnish what is called by the section a statement of allegations, in a form prescribed by rules made by the Lord Chancellor, which statement is to contain allegations made by the applicant and the defendant respectively, and secondly, information as to such other matters relating to the proceedings or to the parties thereto as may be so prescribed, provided that no allegation made by a party is to be included without the consent in writing of that party.

By sub-s. 2, where statements of allegations are furnished to the court the probation officer is to cause copies to be delivered or to be sent by post to the applicant and to the defendant.

Finally, by sub-s. 3, where statements of allegations have been furnished to the court and delivered or sent to the applicant and the defendant under this section the court may, if it think fit, make use of the statements of allegations for the purposes of putting, or causing to be put, questions to any witness so, however, that nothing contained in a statement of allegations shall be received by a court as evidence.

That section appears to recognize very plainly the general considerations to which I have alluded and to describe the very limited extent to which any departure from the usual rules of evidence may be permitted.

When, however, it comes to an inquiry into means the

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procedure is different. Sect. 5 provides that where in any domestic proceedings in which an order may be made for periodical payment of money by any person and the court has requested the probation officer to conduct an investigation as to the means of the parties, the court may direct the probation officer to report the result of his investigation to the court in accordance with the provisions of this section. Then follows this proviso: "Provided that, in the case of any "such domestic proceedings . . . . no direction to report to "the court shall be given to a probation officer under this "sub-section until the court has determined all issues in the "proceedings other than the issue as to the amount to be "paid by such an order." Then when in those circumstances the probation officer has reported, by sub-s. 2: "the court may "require the probation officer to furnish a statement in "writing as to his investigations which shall be read aloud in "the presence of such parties to the proceedings as may be "present at the hearing," or he may "make an oral statement "to the court as to his investigation."

Then by sub-s. 3: "immediately after the statement of the "probation officer has been read aloud or made, as the case "may be, under the last foregoing sub-section, the court shall "ask each party to the proceedings whether he or she objects "to anything contained in the statement and where objection "is made the court shall require the probation officer to give "evidence on oath as to his investigation."

By sub-s. 4 it is provided that "any statement made by a "probation officer in a statement furnished or made by him "under [the two preceding sub-sections] may be received by "the court as evidence, notwithstanding anything to the "contrary in any enactment or rule of law relating to the "admissibility of evidence." But it is to be noted that the report which is thus made evidence on the question of means, and on the question of means only, is not even to be called for until all issues in the case other than that as to the amount have been determined.

I now turn to the justices' reasons for their decision. Having received the evidence of the wife to which I have referred—

that she was not in a fit state of health to continue working, that she had earned 2*l.* in the two preceding weeks—the justices give their reasons as follows: "The justices, having "come to the conclusion on the first hearing that there had "been wilful neglect to maintain, received a report from the "probation officer at this adjourned hearing, from which it "was evident that there was no disposition on the part of the "husband to resume amicable relationship with his wife, or "to make proper provision for her out of his own earnings. "A statement was furnished as to the amount of his wages "which were in excess of the amount which he had stated as "his average weekly earnings. In view of the husband's "means and of the wife's condition of health the justices "considered that there was no necessity for her to continue "in employment, and they granted her a maintenance order "accordingly."

That, quite plainly, was, as the statute prescribes that it should be, the final determination of the case. Although the justices say, as is no doubt the fact and indeed as they have recorded, that on the first occasion they had come to the conclusion that there had been wilful neglect to maintain, two things are quite plain on the face of this statement of their reasons. The first is that that conclusion on the first hearing was not the final conclusion; the second is that they received evidence on this further hearing which assisted them in coming to their final conclusion, for they say that the report, which it is conceded on both sides was referred to in the court as being a report in writing by the probation officer, dealt with three things. It dealt with the possibility of reconciliation; it dealt with the husband's intention to make proper provision for the wife, which is of the essence of the offence of wilful neglect to maintain; and it dealt with his earnings, that is to say, with his means. The first two of those matters were relevant on the question of the offence, the third of those matters was relevant on the question of amount and amount only.

It is plain beyond doubt on the face of the section that a report as to means on which the amount of the award is to be determined is to be called for and made after the other issues

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have been determined. Here there was a report which deals with both the merits and the amount. Whether it is regarded in so far as it deals with amount, as a report under s. 5, or whether it is looked at in so far as it deals with merits, as a statement under s. 4, in neither case was the statute complied with in any particular. Contrary to s. 4 it was received in evidence on the merits, and contrary to s. 5 it was made as a report on means before the merits had been determined and in neither case was either party given any opportunity of knowing what was in the report and exercising such rights as are given under the sections in respect thereof.

I regard it as of the utmost importance that this procedure regulating the most useful and most helpful investigations by probation officers should be strictly complied with by benches of magistrates. This case is a perfect illustration of the difficulties which may arise if these regulations are not complied with. We have not the faintest idea what was in the report except in so far as it is reflected by the justices' findings. Speaking, as I wish to speak as far as possible, generally on the matter in emphasizing the importance of compliance with the statute, it is also true that the more doubt there is in the particular case the more necessary it is that these requirements should be strictly complied with. Here we are quite plainly dealing with a border line case, and we could not possibly with any satisfaction to ourselves decide matters which are in doubt and dispute in ignorance of the nature of the probation officer's report, and without being satisfied that the parties had the prescribed means of testing the accuracy of what appears in that report.

For that reason I do not propose in this judgment to go into the merits of the points which still remain in controversy beyond saying this: it is asserted by the husband, and there is some confirmation of that assertion on the face of the justices' decision, that the justices stated in open court that they did not intend to take into account the wife's means or earning capacity because it had not been their custom to do so. If that is their view of the law it is wrong and must be amended at once. It is their duty to take into account the

means of a wife, including her earning capacity, in an appropriate case. It goes without saying that even if a wife has been earning money justices are not obliged to take that fact into account if they are satisfied that she is no longer capable of doing so or for some legitimate reason it is inappropriate that she should go to work, but anything in the nature of a general rule that the wife's means of earning are not to be looked at is plainly contrary to the law.

It is also, of course, open to the justices to make an order for custody where there has been a wilful neglect to maintain and I am not prepared to dispute that even where the parties are living together and the children are living with the parties, it may be appropriate in certain circumstances as being the only method of ensuring justice that the wife shall be given custody of the children. But in a case where the parties are living together and the children have been evacuated under a Government Evacuation Scheme it does, on the face of it, appear a strong measure to give the custody of the children to the wife, more particularly as it appears to be common ground that the husband is regularly paying the billetting allowance. For the same reason it appears on the face of it to be unnecessary to order that the money for their billetting, or to put it a little more accurately the equivalent of their billetting money, should be ordered by way of maintenance to be paid to the proper officer of the Becontree court when all the time the husband is paying it to whoever should receive it at the other end.

These again are matters for consideration, but I suspect that their determination in this particular case was governed very largely by this report of the probation officer which we have not had the chance of seeing and the parties have not had the chance of testing. No doubt, if it is established by some evidence that the husband though at the moment living with his wife intends to desert her and intends to make no proper provision for her, that may be a good ground for making a precautionary order for custody, but we have no legitimate means of judging whether that is so or not.

These matters must all be dealt with afresh by the Becontree

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Bench. I think it would be better that they should be dealt with by other members of that Bench than those who have already come to the decision which is challenged here. I do not think it would be right to accede to the suggestion that the case should be remitted to some other Bench altogether, for I am quite sure that now that the Becontree justices have heard our views upon this matter, and in particular upon not merely the desirability but the necessity for a strict compliance with the statute relating to inquiries by probation officers, they will gladly be bound by what we have said and come to such determination on the merits of this case as the facts warrant. The case will be remitted to a Bench of Justices at Becontree.

HODSON J. I agree that this case should be remitted for further hearing. The order made on August 7, 1940, was an order against the appellant made on the grounds that he had wilfully neglected to provide reasonable maintenance for his wife and her infant children, and an order was made for the maintenance of the wife and also for the maintenance of the children of whom the wife was given custody.

The facts stated quite shortly were that at the time the application for the summons was taken out in June, 1940, and indeed at the time of the final hearing in August, 1940, the husband and wife were living under the same roof and the children had been evacuated. The wife had been earning, and the husband had been earning larger sums than the wife.

In these circumstances the matter came before the justices, who I think took the very proper course of adjourning the case in order that the probation officer might look into the matter to see if there was any prospect of reconciliation. That adjournment or reference to the probation officer for his report was as the President pointed out necessarily under s. 4 of the Summary Procedure (Domestic Proceedings) Act, 1937. It must have been under s. 4, because it was before any final determination of the matters between the parties. Upon the failure of the probation officer to bring about a reconciliation of those two people, although these people were

still living together, the justices were asked to make an order without hearing any further evidence so far as the note reveals except a short statement by the wife to the effect that she was not in a fit state to continue work and had earned 2*l.* in two weeks. The justices made the order stated and gave reasons for their decision.

The reasons for the decision given included a reference to the report from the probation officer. It is quite plain, indeed it is admitted, that that report from the probation officer was never in any way disclosed to the husband, or indeed to the wife, nor were any of the provisions of s. 4 complied with. In those circumstances there is on the face of it a very serious irregularity, and it is no use to argue that the justices may have come to the conclusion to which they did come on the facts, that is to say as to wilful neglect to maintain, without regard to this report because this report is referred to as being part of the justices' reasons for their decision. I am sure that it is impossible for this Court to leave the matter as it stands. The statute not having been complied with and the justices having included that report in the reasons for their decision, the matter must go back to them for re-hearing.

With regard to s. 5 the investigation as to means which the probation officer may make must follow the determination of the issue between the parties. Speaking for myself, I am not sure what the justices have done on that or how they used it, if at all, because the paragraph dealing with the probation officer's report is separate from the paragraph dealing with the husband's wages. They say in a separate paragraph: "A "statement was furnished as to the amount of his wages "which were in excess of the amount which he had stated "as his average weekly earnings." It is not clear to me whether that statement was made as a result of the evidence of the probation officer or not, although it is quite true that above, in the paragraph dealing with the probation officer's report, the justices refer to the lack of disposition on the part of the husband to make proper provision for his wife out of his own earnings. That may, of course, only refer to the fact that the husband thought his wife was earning

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enough to keep herself and was not prepared to give her anything out of his own earnings for her support, having regard to the fact that the children were away and nothing had to be paid for them.

In case there may be confusion about the matter in this or other benches it is important to notice that there are two sets of circumstances in which reference may be made to probation officers and that the procedure is different in each case. In the first case where the matter is adjourned for reconciliation or in order to persuade the parties to settle their differences out of court, the statement made by the probation officer is not in any circumstances to be evidence upon which the magistrates may come to the conclusion ; whereas in investigating means the statement of the probation officer may be, if the statute is complied with, used.

With regard to the provision in the order with regard to custody, it seems to me, on the face of it at any rate, quite inappropriate to make an order for custody of these two children at all in the circumstances of this case ; the children being evacuated away from the parents, the parents being together and the father having at all times paid the 6*s*. a week in respect of each child, the amount that he is called upon to pay. There may be circumstances in which it may be necessary when parents are living together and the children away to make an order for custody, and that matter as well will be remitted to the justices for their consideration.

I agree that this order cannot stand, and, therefore, it should be discharged.

THE PRESIDENT. The order will be that the appeal will be allowed, the present order discharged and the case remitted to other justices sitting at Becontree for re-hearing.

Solicitors : *P. R. Kimber ; Cartwright, Cunningham & Co.*

W. L.

THE PRINS KNUD.

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Feb. 11.

Shipping — Salvage — Services to Danish ship—Subsequent seizure of ship in prize—Requisition—Technical enemy ship—Intimation by Crown of intention to release after war—Enforcement of salvage award of Admiralty Court—Application by salvors for order that Crown proceed to condemnation—Prize Court Rules, 1939, *Order* v., *r.* 4 ; *Order* XXIX., *r.* 5.

The claimants rendered salvage services to the Danish steamship *Prins Knud*. Shortly afterwards, Denmark was invaded by the Germans and on April 11, 1940, the *Prins Knud* was seized as prize and requisitioned ; and, in accordance with Order XXIX., r. 5, of the Prize Court Rules, 1939, an undertaking was given for payment into court of the appraised value of the ship " at such time or " times as the Court shall declare by order that the same or any part thereof is required for the purpose of payment out of Court."

In July, 1940, in default of appearance by the Danish owners, the claimants obtained an award in the Admiralty Court of 6500*l*., " judgment to stand over until after the conclusion of the " proceedings in prize."

In an endeavour to obtain payment of the salvage award, the claimants filed a claim in the prize proceedings for an order that an amount sufficient to satisfy the claims should be paid into court in accordance with the Crown's undertaking, and took out a summons under Order v., r. 4, for an order that the captors should " forthwith proceed to adjudication in this cause instituted " for the condemnation of the said steamship and cargo or for " such other order as to the judge may seem fit so as to enable " the claims herein . . . . to be adjudicated upon."

It was intimated by the Crown that after the German occupation of Denmark assurances had been given on behalf of H. M. Government that Danish vessels seized as prize would be handed back to their owners after the war, and that accordingly the present policy of the Government was to refrain from seeking decrees of condemnation, but that to safeguard claimants there would be no release to the Danish owners without application to the Prize Court and upon proper notice to all claimants who, like the present claimants, had registered their claims.

The claimants contended that to institute prize proceedings and requisition a vessel, and then announce that there was no intention of seeking condemnation, was inconsistent with the decision in *The Zamora* [1916] 2 A. C. 77, that a vessel should not be requisitioned in prize unless there was a real question to be tried ; that in the present case no question was going to be tried, and that the *Prins Knud*, being an enemy vessel, the Crown should be ordered to proceed to adjudication.

At the hearing it was intimated that the Danish owners wished to contest the claimants' right to enforce the award in prize :—

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Held, that the *Prins Knud* being an enemy vessel, the mere fact that the Government, for reasons of high policy, had expressed a unilateral intention to take a course, which ultimately would not involve condemnation, did not affect the matter, there was clearly a question to be tried if the Government was minded to try it; that high consideration of the interests of the realm must take precedence of such comparatively minor inconvenience as might result from postponing the decision of the issue until after the termination of hostilities; and further that it would be wrong for the Court to exercise its discretion in the claimants' favour without giving the Danish owners an opportunity of contesting the right of the claimants to enforce a salvage award in the Prize Court.

SUMMONS heard in Chambers and ordered to be re-argued in Court.

The facts are sufficiently summarized in the headnote and are fully set out in the judgment.

The relevant rules of the Prize Court Rules, 1939, under which the summons was issued, were the following:—

Order V., r. 1, provides that "where a ship . . . . still remains "detained . . . . and no cause is instituted against it within "one month from the time it is so taken or seized, a claimant "may, after issuing a writ . . . . apply for an order for the "release of the ship. . . ."

Rule 4 provides that "any person interested in a ship, "may, without issuing a writ, under the circumstances stated "in r. 1 . . . . apply by summons for an order that the captors "proceed to adjudication, and the judge may, on the hearing "of such summons, order the captors to proceed to adjudication "or make such other order as he may think fit."

Order XXIX., r. 1, provides that "where it is made to appear "to the judge on the application of the proper officer of the "Crown that it is desired to requisition on behalf of His "Majesty a ship . . . . in respect of which no final decree of "condemnation has been made, he may order that the ship ". . . . shall be appraised . . . ."

Rule 5 provides that "in every case of requisition under this "Order an undertaking in writing shall be filed by the proper "officer of the Crown for payment into Court on behalf of the "Crown of the appraised value of the ship . . . . at such time

"or times as the Court shall declare by order that the same or "any part thereof is required for the purpose of payment out "of Court."

Order XLV. provides that "In all cases not provided for by "these Rules, the practice of the High Court of Admiralty "of England in prize proceedings shall be followed, or such "other practice as the President may direct."

G. St. C. Pilcher K.C. and *Waldo Porges* for the claimants. Under Order v., r. 4, the court has a discretion to order the captors to proceed to adjudication, and under Order XXIX., r. 5, they should be ordered to pay into court a sufficient sum to meet the claim. The Crown may take the point that r. 4 of Order v. is not applicable because of the words in r. 1 "where "no cause is instituted," but r. 4 cannot be so limited, for the captors could not be ordered to proceed to adjudication if no action had been instituted. The Court also has a general discretion under Order XLIX.

The prize proceedings against the ship will never be completed, for the Crown has announced that the Danish ships which have been seized and requisitioned will be handed back to their owners after the war. The Crown, however, is not entitled to depart from the recognized procedure in prize by seizing and requisitioning a vessel against which there is no real question to be tried, and so deprive the claimants of their rights: see *The Zamora* (1). Under the ordinary rules of prize law, Danish ships being technically enemy ships, the Crown would proceed to condemnation. The Court ought to be apprised upon proper evidence of the reason for the decision not to proceed to condemnation and thus modify the procedure of the Prize Court. The procedure adopted is not in accordance with international law, and the Court should exercise its discretion to enable the claimants to litigate the question whether they are entitled to the sum of 6500*l.* in the prize proceedings and, if they are, to obtain that sum without having to wait until after the war.

The Attorney-General (*Sir Donald Somervell K.C.*) and *J. V.*

(1) [1916] 2 A. C. 77.

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Nesbitt for the Procurator-General. On the assumption that the claimants have a claim enforceable in the Prize Court (see *The Chateaubriand* (1)), the Crown does not deny that they may be able to come to the Court for an order for directions; although there may be ground for construing Order v, r. 4, as applicable only to cases where no writ has been issued. What, however, the claimants, with only a subsidiary interest, are endeavouring to do is to direct how persons with the principal interest should conduct the proceedings. The claim should be postponed until the conclusion of hostilities, just as in the last war persons having claims against vessels detained under *The Chile* (2) order had their claims postponed. Substantially these Danish vessels are being dealt with as ships which came within the Hague Conventions were dealt with: see, on the same analogy, *The Tergestea* (3), where the claims of the Crown were given precedence over claims in civil proceedings.

[THE PRESIDENT referred to *The Inna* (4) and *Attorney-General* v. *Norstedt* (5) there cited, where the claims of salvors were preferred to the right of the Crown to forfeiture.]

The claimants are amply protected by the Crown's undertaking that the ship will not be released without apprising the Prize Court and with notice to persons who have registered claims.

[THE PRESIDENT. Why should not the claimants have the right to litigate the point that they have an enforceable claim, without the Crown proceeding to adjudication?]

That is not what they are asking for. The procedure adopted by the Crown as a matter of State policy does not conflict with any rights or duties stated in *The Zamora* (6). The *Prins Knud* is technically an enemy ship which it would be improper to release. The Crown could ask for condemnation, but is clearly entitled to ask for less. Further, it would be improper to dispose of the claim without giving the Danish owners an opportunity of being heard.

(1) [1916] W. N. 105.
(2) [1914] P. 212.
(3) (1915) 2 Ll. (P. C.) 149.
(4) [1938] P. 148, 153.
(5) (1816) 3 Price, 97, 136.
(6) [1916] 2 A. C. 77.

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G. St. C. Pilcher K.C. in reply. All that the claimants want is the money in Court.

[THE PRESIDENT. I should be disposed to give you leave to litigate for a declaration that the claim is good, but it is not necessary for any money to be paid into Court for that.]

That is not what the claimants want ; they want the money in Court. There is no undertaking to pay in any specific sum even if the ship is sunk. There may not be sufficient money after the war to meet the claimants' salvage award, for other claims may have accrued against the ship having priority to that of the claimants, and to make them wait until the end of the war may be a serious denial of justice.

THE PRESIDENT (LORD MERRIMAN). This is a summons issued by Messrs. France, Fenwick, Tyne and Wear Co. Ld., who are the owners of the three tugs named *Hendon*, *Wearmouth* and *Corsair*, asking that an order be made that "His Majesty's "Procurator-General or other proper officer of the Crown do "forthwith proceed to adjudication in this cause instituted for "the condemnation of" the *Prins Knud*, a Danish vessel, and her cargo, "or such other order as to the judge may seem fit "so as to enable the claims" [of the persons whose names I have just mentioned] "to be adjudicated upon."

It is necessary to go back to the circumstances in which this claim of the claimants arises. Before Denmark was invaded on April 9 and 10, 1940, these claimants had rendered salvage services to the vessel in question. The services were protracted ; I am told that one tug was engaged throughout the best part of two months—which I understand were February and March—and that they rendered valuable services there is no question, for when the action came on before Langton J. he made an award on July 8, 1940, for 6,500*l.* and costs, the bulk of which went to the owners, master and crew of the *Hendon*.

Meanwhile this vessel was arrested in prize on April 11, that is to say, the day after the invasion of Denmark. On April 12, the writ in prize was issued and the arrest withdrawn. In pursuance of the appropriate procedure laid down in the

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well known case of *The Zamora* (1), and upon proper evidence, as I am informed, the registrar permitted the Crown to requisition this ship on April 20.

In connection with that requisition there was given, in accordance with Order XXIX., r. 5, of the Prize Court Rules, an undertaking in writing by the proper officer of the Crown for payment into Court on behalf of the Crown of the appraised value of the ship, or an amount fixed under r. 4 of the Order—that I think does not arise—"at such time or times as the "Court shall declare by order that the same or any part thereof "is required for the purpose of payment out of Court."

On August 29, 1940, the claimants entered an appearance in respect of the ship only; and on November 4 they formulated their claim in respect of the salvage services which I have mentioned; and the material part of the claim upon which stress is laid is: "For an Order that an amount sufficient to "satisfy the aforesaid claims be paid into court by the Crown "in accordance with the undertaking" which I have just mentioned; "For such further or other relief as to the Court "may seem just"; and finally: "For payment out to the "claimants of such sum as may be found due to them and costs."

As the learned Attorney-General has pointed out to me, these claimants, I need scarcely mention, are not the only people who, in one form or another, have claims against Danish subjects which accrued before Denmark became an enemy country, and who are anxious to obtain payment of these claims in some way or another notwithstanding that their debtor is now an enemy. However, I am really concerned only with this in so far as it affects this claim in prize.

It seems on the face of it rather a strong thing, on the one hand, that a subsidiary claimant should be entitled to come forward and take, so to speak, control of the suit, and insist that the Crown shall proceed forthwith, and that the Court should proceed forthwith, to adjudication whatever other considerations may apply, so that these particular claimants should get their rights, whatever they may be. On the other hand, it also seems rather hard, on the face of it, that the

(1) [1916] 2 A. C. 77.

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rights of these claimants, whatever they may be, should be postponed for determination and satisfaction to the end of the war. For this reason it is necessary to examine a little closely what are the circumstances upon which the Crown relies.

By way of preface, before examining the matter further, I ought to say that this matter came before me in chambers; and when, at the end of the hearing, it was indicated that there might be a desire to appeal, I came to the conclusion that it would be much more satisfactory that a formal argument in Court, when the whole matter could be ventilated, should take place rather than that it should be dealt with on appeal merely on recollection of an informal discussion in chambers. But in fact most of the ground that has been covered to-day was covered in the argument before me then, and in particular the document to which I am about to allude was put in before me on that occasion.

At the hearing in chambers, on behalf of the Procurator-General (and the Attorney-General has formally adopted the document as representing a correct statement of the position of His Majesty's Government) I was handed a typewritten statement to the following effect: "(1.) After the German "occupation of Denmark assurances were given on behalf "of His Majesty's Government that, speaking generally, "Danish vessels seized as prize would be handed back to their "owners after the war. (2.) Because of these assurances, the "present policy of His Majesty's Government is to refrain "from seeking decrees of condemnation of Danish vessels "seized as prize. (3.) In order that the claims of British "creditors (brokers, salvors, necessaries men, etc.) should be "safeguarded, when the time came for the return to their "owners of Danish vessels, a public announcement was made "that such claims should be registered with the Accountant-"General of the Ministry of Shipping. (4.) This particular "claim has been registered at the Ministry."

That statement of the present intentions of His Majesty's Government does not, as has been emphasized, represent any bargain made with any owners or with the Danish Government, but is a unilateral statement of the intentions of the British

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Government. It is insisted (and it seems to me to be quite obvious that this is so) that it is a statement which is dictated by reasons of high policy; and it really does not require very much imagination to see what underlies so important a declaration of intention as this. I do not therefore propose, and I do not think it is my business, to examine the matter any further. I accept the Attorney-General's statement that this policy is a matter of high interest to the realm.

Both at the earlier hearing and at the more formal hearing in Court to-day, I was assured by the Attorney-General that in reference to this particular case (and, indeed, with reference to all such cases covered by the statement of policy) His Majesty's Government undertakes that there will be no release to owners without application to the Prize Court; secondly, that no such release will be made except upon proper notice to claimants such as the present claimants, who have registered their claims; and it was made clear also that the same undertaking applied to any sum brought into Court in lieu of the ship in the event of her loss under the undertaking given under the rule to which I have already alluded; and so that there shall be no doubt about the specific application of these undertakings, they were all given in reference to these claimants' specific claim. During the argument in chambers, an undertaking was given at my suggestion (and the undertaking has been given again to-day) that, if the ship should be lost, and therefore represented only by her appraised value, prompt notification should be given to the claimants so that, if they so desired, they could apply on the undertaking under the rule for payment of the appraised value into Court and might pursue their claim against the proceeds. I suggested that because it is obvious that, though there may be difficulties in connection with proceeding to adjudication about the condemnation of the ship as a whole, it might conceivably be more possible to deal with the proceeds—or rather, the claim of the claimants against the proceeds—independently of the condemnation or release of the ship. It was because the claimants were not satisfied by those undertakings that, as I say, the matter was adjourned into Court.

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The Attorney-General has reserved the point that under the provisions of Order v., r. 4, on which the application is based, outside claimants of this kind have really no locus standi except where no writ has been issued; but he was inclined to agree, I think, that the point was to some extent academic because he would not have been prepared to deny the Court's inherent jurisdiction to deal with the situation of claimants who had actually appeared to a writ, as in this case, and no time was spent on that point. Also it was assumed—though the point may be highly controversial—that these claimants have a claim in prize. That was assumed for the purpose of the argument, and it must not be taken to be decided one way or the other. I mention that specifically because, notice having been given, since the matter was before me in chambers, to the owners, solicitors are in Court to-day and have intimated to me that though they have nothing to say about the enforcement of the judgment in civil proceedings—there is going to be no contention that the award is not a perfectly good award, or for the right amount—they wish on behalf of the owners to contest its enforcement in prize. This emphasizes the point which was made by the Attorney-General that on any view—whether one is dealing with the ship itself or with the proceeds of the ship—it would be wrong to dispose finally of the claim of these claimants at a time when the owners have no opportunity of being heard. They had, in fact, no opportunity of being heard before Langton J., but that point now appears to be academic.

I am bound to say that, though I have some sympathy with these claimants, I think that I should be doing wrong if I made an order in their interests compelling the Crown to bring this case to adjudication when I am told, on the authority of the Attorney-General, that these considerations of high policy have induced His Majesty's Government to say that, as at present advised, they do not intend to proceed to seek condemnation of these Danish ships. I think that high considerations of the interests of the realm must take precedence of such comparatively minor inconvenience as may result from whatever postponement of the decision of

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this issue is involved in awaiting the termination of hostilities. If I were to hold that the interest of this, that or the other claimant overrides these high considerations in one case, I should have to hold it in all, and that would be in effect to reverse the decision on policy at which the Government has arrived.

I was at one time in some doubt whether the action taken to requisition this vessel, while at the same time saying that there was no intention to seek condemnation, was consistent with the decision of the Privy Council in *The Zamora* (1). The Attorney-General has satisfied me that there is really no conflict between the two. Put in a word, the point in *The Zamora* (1) was that there was to be no requisition merely by executive order; it was to be requisition in prize, and in advance of condemnation only upon a judicial decision which involved that in the prize suit there was some real question to be fought so that (and I emphasize the words "so that") it would be improper to order immediate release. There can really be no two opinions about there being a question to be fought if the Government are minded to fight it, because here the vessel in question is, beyond doubt, within the meaning of prize law, an enemy vessel. The mere fact that the Government have expressed a unilateral intention of taking a course which will not involve condemnation ultimately does not seem to me really to affect the matter one way or the other. If it were insisted that this matter should come to a head in prize, there would be very little doubt, I think, what the result would be. It is, at any rate, quite certain, to put it at its lowest, that there would be such a question as to what the result would be that there could be no question of ordering an immediate release. There is, therefore, I think, no conflict in this case with the judgment in *The Zamora* (1); and, as I say, I think there is every reason of public interest why this question should be allowed, as the Government have announced that it should be allowed, to stand over until the end of the war.

If that is so, it is impossible for me to order that the whole

(1) [1916] 2 A. C. 77.

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case should come on for adjudication; but one can very well see that, short of that, there might be very great convenience to the claimants in at least getting a declaration of their rights; and I made it quite plain to Mr. Pilcher that, if he asked for that, I should be inclined to make such an order, though it is not, of course, what he is asking for in this summons. I am bound to confess that I was a little impressed by what the Attorney-General said on the point. Though he did not dispute that the Court had jurisdiction to do it, he did point out that payment in any case would not be made before the end of the war and after the owners had had an opportunity of being heard, as apparently they wished to be heard, and therefore there really was no advantage in having the rights determined now, and I think there is a good deal in that. However, if the claimants had pressed for it, I should have been inclined to let them have their decision one way or the other on the question of right here and now. But that offer was formally refused; money and nothing less than their money is what the claimants want, so that there is no more to be said about that.

I used the phrase a short time ago, "the comparatively "minor inconvenience" occasioned by postponement. In any individual case, of course, the inconvenience may be greater or less; I am not thinking of it so much from the individual point of view as the general inconvenience to be sustained by claimants generally in the like case. In my opinion, they are completely safeguarded, so far as their rights are concerned, by the undertakings which the Attorney-General has reaffirmed to-day. The release will take place in prize, and in prize only, and upon notice. That means that the claimants then, if they can do so, may establish their claim and ensure that release only occurs with such provisions as the Court thinks right to safeguard their claims. I am not prejudging the matter in any way; they will have their full right, and full opportunity, of enforcing and safeguarding their claims at that time. In this particular case the undertaking still stands to give prompt notification of the loss of the ship, so that this

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application for payment into Court and adjudication, at any rate, of their claim may then be renewed.

In my opinion, after having heard this matter twice argued, in the exercise of my discretion I do not think that I ought to make any other order, and that the claimants ought to be satisfied with the undertakings which have been given. But, as on the previous occasion, although I make no order on this summons now, I safeguard the right of the claimants to come back should the ship be lost and they think that any application can profitably be made in those circumstances, by giving liberty to apply.

No order as to costs.

Leave to appeal. Security, by agreement, in the sum of 150*l.*

Solicitors for the claimants: *Middleton, Lewis & Clarke, for Middleton & Co., Sunderland.*

Solicitor for the Procurator-General: *The Treasury Solicitor.*

E. C. M. T.

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Feb. 26.

Shipping — Condemnation — Passing of property — Sale in transitu in contemplation of war—Delivery to buyers' agents after outbreak of war—Public policy —Trading with the enemy legislation.

The claimants, a British company, claimed as their property twenty tons of latex which the Crown sought to condemn as prize. The latex, which was laden in the British steamship *Glenearn*, had been sold by the claimants to a German company to which the claimants had parted with the documents of title against acceptance of a bill of exchange for the purchase price. When the *Glenearn* arrived in London towards the end of August, 1939, owing to the international situation the continuation of her voyage to Hamburg was abandoned. At this time there were other consignments of latex from the claimants in German vessels and at Genoa on their way to the German company, in respect of which the claimants had not been paid and still retained the documents of title. In these circumstances, on August 28, the claimants and the German company agreed that twenty tons of these consignments should be exchanged for the twenty tons ex the *Glenearn*, then in process of being discharged into the Port of London Authority's sheds. The shipping documents were accordingly exchanged through a Dutch firm ; those relating to the *Glenearn's* consignment reaching the claimants on September 1. On the same day the claimants, who had no warehouse of their own, sent the bills of lading to their agents, a firm of warehousemen, and instructed them to clear the goods from the Port of London Authority's premises and store them in their own warehouse. This the warehousemen did on September 12. On October 9, while still in the warehouse, the goods were seized as prize.

The exchange agreement was intended to operate as an out and out sale of the respective consignments, and on balance there was a sum due from the claimants to the German company. It was admitted, however, that according to municipal law the property in the *Glenearn's* consignment had re-passed to the claimants before the outbreak of war.

It was contended on behalf of the Crown that a bargain by British subjects of the kind entered into, in contemplation of war, was contrary to public policy ; infringed the law regarding trading with the enemy ; and further, that when seized the goods were still in transitu, as the claimants had never taken actual delivery themselves ; that in prize law constructive delivery to agents was not sufficient, and that the goods were still to be regarded as enemy property :—

Held, (*i.*) That while trading with an enemy was forbidden, the word ' enemy ' implied that the trading took place after war had broken out ; that the purchase of the *Glenearn's* consignment did not offend any existing legislation ; and that the Crown could not invoke any doctrine of public policy.

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(ii.) That a company must act through agents, and that the claimants took actual delivery on the arrival of the goods at their agents' warehouse in the only practical business way in which they could take delivery, and, therefore, that they were entitled to the release of the goods.

ACTION for condemnation of cargo.

The Crown sought to condemn as enemy property 198 drums of latex (rubber) ex the British steamship *Glenearn*. The claimants, Revertex, Ld., a British company, claimed the release of the goods on the ground that at all material times they were the owners of them.

The facts, which are summarized in the headnote, are fully set out in the judgment.

B. J. M. MacKenna for the Procurator-General. The consignment should be condemned as enemy property. The exchange agreement was entered into with the object of protecting the German company from having its goods seized, and the claimants lent themselves to the scheme. Such an agreement is against public policy and one which this Court should not recognize: see *Janson* v. *Driefontein Consolidated Gold Mines, Ld.* (1), where Lord Lindley said that contracts made before war broke out, but in contemplation of it, for the protection of an enemy's property against British capture would not be recognized in this country and were clearly against public policy.

[THE PRESIDENT referred to the Trading with the Enemy Act, 1939 (2 & 3 Geo. 6, c. 89).]

It may be, as the question of adjusting prices had still to be gone into and the claimants endeavoured to get possession of goods, which in the Crown's contention were still enemy goods, the transactions were illegal under that statute, and the Crown rely on it. But, apart altogether from public policy or statute law, the agreement was made while the goods were in transit in expectation of war, and constructive delivery to the claimants' agents after the outbreak of war is not sufficient to pass the property in the goods: see *The*

(1) [1902] A. C. 484, 507.

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Bawean (1), which is strongly in the Crown's favour; *The Jan Frederick* (2); *The Baltica* (3). [Reference was also made to *The Ariel* (4).]

Cyril Miller for the claimants. The agreement was bona fide; the intention was to pass the property in the respective parcels out and out; in law they were sales, it was not a barter agreement, and the property passed to the claimants at the time the agreement was entered into. It was an unconditional contract for the sale of specific goods in a deliverable state within s. 18 of the Sale of Goods Act.

The term "transit" in reference to the doctrine of transfer in transitu it is suggested is only applicable to goods at sea at the outbreak of war: see *The Roumanian* (5), but it may be difficult to argue that contention in this Court in view of observations in *The Baltica* (3).

[THE PRESIDENT referred to *Kendal* v. *Marshall, Stevens and Co.* (6) and s. 45, sub-s. 3, of the Sale of Goods Act on transit not being at an end until the attornment of the agents to the buyers.]

The Port of London Authority received the bills of lading on September 1 two days before war broke out, and, having subsequently handed over the goods, should be taken retrospectively to have attorned to the claimants from that date; but even if the goods were held in the intermediate position described in the notes to s. 44 of the Sale of Goods Act (see Chalmers, 11th ed., p. 117) the claimants obtained actual possession through their agents, the warehousemen, on September 12 when the goods were warehoused on their behalf.

Nothing that the claimants did offended against the common law or the trading with the enemy legislation. They had no dealings with the German company after the outbreak of war; they merely obtained their own goods.

[THE PRESIDENT. The exchange agreement enabled a potential enemy to get latex in Germany after war broke out,

(1) [1918] P. 58.
(2) (1804) 5 C. Rob. 127.
(3) (1857) 11 Moo P. C. 141.
(4) (1857) 11 Moo. P. C. 119.
(5) [1916] 1 A. C. 124, 136.
(6) (1883) 11 Q. B. D. 356.

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and on the adjustment the claimants still had to pay part of the price of the *Glenearn's* consignment.]

When the claimants entered into the agreement the German company were not enemies; the transaction was complete before the outbreak of war. The Crown also is not concerned with the other consignments, which are not before the Prize Court. The balance due from the claimants on the adjustment cannot be paid to the German company during war time and presumably will be payable to the Custodian of Enemy Property.

In *The Bawean* (1) there was no delivery but merely transfer into another vessel, and in *The Vesta* (2) the Privy Council, in commenting on that case, said that they did not agree that as long as the original voyage of an enemy vessel was incomplete there always remained an indefeasible right to capture; see also *The Southfield* (3), where Sir Samuel Evans said as regards purchases in transitu that the proposition that if war intervened there must always be actual delivery before capture was too wide.

[THE PRESIDENT referred to *The Dirigo* (4) where Lord Sterndale distinguished *The Southfield* (3) on the facts.]

[Reference was also made to *The Daksa* (5).]

MacKenna in reply. If municipal law applied it is not denied that the property in the goods would have passed before the outbreak of war. In prize law, however, the claimants needed to obtain delivery. They did not do this, assuming, which is not admitted, that delivery to their agents was sufficient, until September 12 when on the claimants' alternative case the German company was divested of its property. British subjects cannot do that; all the cases which have been cited deal with neutrals, and different considerations arise in the case of British subjects.

[Reference was also made to *Whitehead* v. *Anderson* (6) and *Coventry* v. *Gladstone* (7).]

Cur. adv. vult.

(1) [1918] P. 58.
(2) [1921] 1 A. C. 774, 778.
(3) [1917] A. C. 390*n*.
(4) [1919] P. 204, 221.
(5) [1917] A. C. 386.
(6) (1842) 9 M. & W. 518.
(7) (1868) L. R. 6 Eq. 44.

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1941. Feb. 26. THE PRESIDENT (LORD MERRIMAN) read the following judgment: In this case the Crown seeks a decree of condemnation of 198 drums of latex weighing about twenty tons, originally part of the cargo of the steamship *Glenearn*, which were seized at London on October 9, 1939. On December 19 a British company, Revertex, Ld., entered an appearance and have since filed a claim, the grounds of which are that they are, and were at all material times, an English corporation and the sole owners of the latex.

The case presents some curious features, and in the course of the argument, which was admirably conducted on both sides, many points were raised. The result of the discussion, however, was to show that about many of these points there was ultimately no conflict. My conclusions on these matters will appear incidentally in dealing with the two main points which emerged for decision, and it will be unnecessary in this judgment to follow all the ramifications of the argument.

The facts, about which there is no serious dispute, though in one important respect there is very grave dispute as to the proper inference to be drawn from these facts, are as follows:—

The claimants had on April 18, 1939, entered into an agreement, in prolongation of an earlier agreement, with the Metall Aktiengesellschaft of Frankfurt a/Main (hereinafter called "the German company") for the exclusive sale by the claimants to the German company, for re-sale by itself or its subsidiaries in specified countries, of their production of revertex, of which the product latex is a brand. I will use the word "latex" throughout, to distinguish the product from the company. One of such subsidiaries was a German company called Kautschuk Gesellschaft (hereinafter referred to as "the "German subsidiary"), and it is common ground that the German company's rights under the agreement, so far as it relates to this particular cargo, were vested in the German subsidiary. I will refer to the agreement, in its relation to this claim, as the German agreement.

Latex is a rubber product, and the goods in question were manufactured for the claimants by an English company, whose estate is situate in Johore. The goods in question are,

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therefore, of British origin. It is unnecessary to examine the German agreement in great detail. The relevant date for calculating the price in respect of this cargo was September 4, 1939. The sales under the agreement were to be on c.i.f. terms, and the insurance was to be of the type customary for c.i.f. contracts, with certain limitations regarding the question of war risks.

It is clear from the documents relating to this cargo that the 198 drums in question were ascertained within the meaning of the Sale of Goods Act, 1893, at the time of shipment. As appears from the bills of lading, the 198 numbered drums were consigned to order at Hamburg and were the only goods included in the bills of lading. The *Glenearn* arrived in the Port of London on or about August 23. Having regard to the international situation the voyage from there to Hamburg was abandoned. This fact became known to the claimants on August 25. It happened, in the ordinary course of business under the German agreement, that two other cargoes of latex were also on their way to the German subsidiary. These cargoes were on board ships named the *Leverkusen* and the *Gneisenau*, both German ships. Of the *Leverkusen's* cargo five tons had been landed at Genoa, at which port ten tons of the *Gneisenau's* cargo had also been landed. The *Leverkusen* proceeded on her voyage to Hamburg with 25 tons of latex, as did also the *Gneisenau* with ten tons on board. I was informed that the price-fixing date in respect of the five tons discharged by the *Leverkusen* at Genoa was August 17, while August 21 was the date in respect of the ten tons discharged by the *Gneisenau*, and that the price-fixing dates in respect of the Hamburg consignments were respectively, for the *Leverkusen's* goods September 6 and for the *Gneisenau's* goods September 10. The claimants had not been paid in respect of either of the consignments discharged at Genoa, which were under their control at that port through their agent there ; nor had they been paid in respect of the balance of the goods en route for Hamburg in either ship. In addition, the Japanese steamship *Terukuni Maru* had left Singapore about August 19 with twenty-one and a half tons of latex, also for the German

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subsidiary, for which the claimants had not been paid. On the other hand the claimants had, on or about August 16, handed over the shipping documents in respect of the *Glenearn* cargo against acceptance of a bill of exchange for the price named in the provisional invoice. Therefore, when the claimants learned of the abandonment of the *Glenearn's* voyage from London to Hamburg the position was as follows :—

Subject to the final fixing of the price under the German agreement they were the sellers of ascertained goods who had parted with the documents of title and had been paid, subject to adjustment one way or the other when the price was finally determined ; while on the other hand in respect of the goods in the other three ships they were unpaid sellers who had not parted with the documents of title.

In these circumstances, on August 28, an arrangement was come to between the claimants and the German subsidiary as follows : the fifteen tons discharged at Genoa and five tons of the *Leverkusen's* cargo en route for Hamburg were to be exchanged for twenty tons which by that time had been, or were in process of being, discharged into the Port of London Authority's warehouses. It was a term of this arrangement that the claimants should be paid for the remaining twenty tons in the *Leverkusen*. The German subsidiary later undertook also to pay for the goods in the *Terukuni Maru*. The claimants were able to intercept the ten tons in the *Gneisenau* at Rotterdam and no further reference to these goods is, therefore, necessary.

Though this arrangement was referred to by the parties, and throughout the argument, as the exchange agreement, it was intended to carry it out in accordance with the German agreement. That is to say, the respective prices would be worked out in accordance with that agreement ; and accordingly by letter from the German subsidiary, dated August 30, confirming the arrangement, it was suggested that the price-fixing date for the whole of the twenty-five tons in the *Leverkusen* should be September 4, which, it will be remembered, was the date in respect of the *Glenearn* shipment. The extent to which the cross payments had actually been

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adjusted before war broke out is left somewhat obscure. It is clear that the shipping documents were exchanged through Messrs. Pierson in Amsterdam, but apparently no financial adjustment was made through them. The shipping documents in respect of this cargo, other than one copy of the bill of lading which was still in the mail, were received by the claimants from Messrs. Pierson on or about September 1. The claimants were paid, as had been arranged, for the latex in the *Leverkusen*, subject to the final adjustment of the price; and I was informed that the balance, subsequently ascertained to be payable by the claimants in respect of the exchange agreement as on September 4, was 143*l.* 3*s.* 5*d.*, calculated as follows: in respect of the *Glenearn* latex the final price was 1676*l.* 14*s.* 11*d.*, and that in respect of the corresponding twenty tons out of the *Leverkusen* and the *Gneisenau* respectively was 1533*l.* 11*s.* 7*d.* But the claimants had not merely to pay, as buyers, for the *Glenearn* latex; they actually held the bill of exchange for the provisional invoice price originally payable to them as sellers, which I understand was met in due course; and, therefore, on becoming buyers instead of sellers of this cargo they would be obliged, somehow or another, to refund this amount. I was not informed at the hearing when and how, if at all, this was done; and subsequent enquiries made at my request by counsel have been abortive. It may be that the amount was set off against the payments made to the claimants in respect of the latex in the *Leverkusen*, or in one of the other ships I have mentioned. But if, as I assume was probably the case, the final settlement was left over until after the revised price-fixing date, no commercial settlement can in fact have taken place; and the same, of course, applies to the sum of 143*l.* 3*s.* 5*d.* itself.

From the foregoing it is clear that, assuming the fifteen tons discharged at Genoa were "specific" goods, though I had no precise information on the matter, the five tons out of the twenty-five tons still in the *Leverkusen*, which formed the balance of the exchange, were clearly unascertained goods. On the other hand the latex in question out of the *Glenearn* was still "ascertained." It was not disputed that, regarding

by itself this sale of these goods to the claimants, the property had re-passed, in accordance with the rules laid down in s. 18 of the Sale of Goods Act, 1893, before the outbreak of war. By letter dated September 1, 1939, the claimants instructed one of their usual warehousemen, the British Bluefries Wharfage and Transport, Ld., to make the necessary arrangements for the clearing of these goods, to pay all the charges due to the Port of London Authority, and to take the goods to store as soon as possible. On or about the same date, and before the outbreak of war, the warehousemen sent the bills of lading, which they had received from the claimants, to the Port of London Authority. It is common ground, however, that they did not take delivery from the Port of London Authority's warehouse until September 11, and the landing account shows that the goods were received into store in their own warehouse on September 12, where they were seized as prize on October 9, 1939, as I have already said.

The claimants have sworn, there is no evidence to the contrary, and I so find, that they have no warehouse of their own, and that the normal procedure is for the warehousemen I have mentioned, or another firm, to take delivery of the goods on the arrival of the ship and to store them for the claimants until they are wanted for delivery to their customers.

The claimants in their affidavit admitted that the exchange agreement, as I shall call it for convenience, was effected in view of the international tension prevailing at the time, with specific reference to the facts that the goods at Genoa would be lost to them if Italy were involved in war, and that they had not been paid for the goods en route for Hamburg, or for those in the *Terukuni Maru*; but they say in effect, and I see no reason to doubt the statement, that they were really concerned with the protection of their own commercial interests and were not considering the matter in relation to prize law. Nevertheless they must be taken to intend the natural consequences of their action. It is plain beyond any doubt, and I so hold, that the exchange agreement was made imminente bello, in avowed contemplation of the difficulties which would arise if war broke out, as in fact it did within a

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week. If, therefore, this transaction is contrary to the law of prize they must take the consequences ; nor, indeed, need any special sympathy be wasted upon them if that is the result. On the other hand I am satisfied, and about this also there is no dispute, that the exchange agreement was made bona fide in the sense that there was no secret or collusive understanding that it was to be disregarded if, contrary to expectation, war should not break out, but was to be performed, in any event, according to its tenor.

From this recital of the facts as I find them, and about which there is little or no dispute, two things are evident. The exchange agreement has on the one hand enabled the German subsidiary to obtain possession, possibly after the outbreak of war, of the fifteen tons of latex at Genoa over which the claimants had control, while on the other hand it has enabled the claimants to assert that the twenty tons, the subject of this claim, which but for the arrangement would have been enemy property in a port of this country and, as such, might have been liable to seizure on the outbreak of war, were their property and so exempt from seizure. Clearly, therefore, the circumstances require careful scrutiny.

Mr. MacKenna, on behalf of the Procurator-General, argued that a bargain of this kind, made by a British subject immediately before the outbreak of war and, as is admitted, in contemplation of war, is void as being contrary to public policy. Alternatively he argued—and this is the second of the two points about which alone, in my opinion, there is any serious controversy—that the goods were still in transitu, as that term is understood in prize law, inasmuch as the claimants had never taken actual delivery themselves, but only through their agents, the warehousemen.

I will deal first with the question of public policy. Mr. MacKenna lays stress on the temptation to defraud and deceive the Government, which the recognition of the lawfulness of such a transaction as this would throw in the way of persons minded to be fraudulent. I recognize the justice of that contention ; but that, of itself, does not seem to me to be a valid reason for condemning goods in respect of which,

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whatever may be the merits or demerits of the transaction, there has in fact been no element of deceit. The common law of England and the legislation relating to trading with an enemy, a phrase which I am using in its widest sense, forbids any form of commerce with the enemy but, as the word implies, that assumes that the commerce is transacted after war has broken out. If public policy so requires, it would have been open for Parliament to say that transactions with a potential enemy though concluded before the outbreak of war should, in circumstances to be defined, be prohibited. So far as I am aware the Legislature has not chosen to do so, and I asked in vain for any authority for the proposition. I do not think it is for the Courts to invent doctrines of public policy in such matters. I can see grave difficulties in any attempt to do so. It would be easy to imagine circumstances in which the most innocent transactions would operate to defeat the potential rights of captors.

It seems to me to be reasonably clear that the purchase of the *Glenearn's* cargo, taken by itself, did not offend any existing legislation. The capacity in which the Port of London Authority held the goods on the outbreak of war was the subject of some discussion. Mr. Miller contended that the Port of London Authority having received the bills of lading before September 3, and having subsequently handed over the goods on payment of their dues, must be taken retrospectively to have attorned to the claimants before war broke out. He was unable to give me any authority for this proposition; in my opinion it is unsupported by evidence and is unsound. Eventually both counsel accepted that the true view was that the goods were held in the intermediate position described in the Notes to s. 44, at p. 117, of the 11th ed. of Chalmer's Sale of Goods Act. Assuming them to be held for the owner whoever he might be, Mr. MacKenna argued that, transitus as understood in prize law not being ended, they must be taken to have been held for the German seller. I will revert later to this point in relation to prize law. Dealing with it, for the moment, in relation to trading with the enemy legislation, Mr. MacKenna agreed that English municipal law would

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apply. He admitted that, in English law, the property in the 198 drums had passed to the claimants. It follows, therefore, that the obtaining of delivery by the claimants' warehousemen from the Port of London Authority, which alone occurred after the outbreak of war, was not the obtaining of goods from an enemy, but the obtaining by a British subject, from bailees who were also British subjects, of his own goods, in which the property had passed to him before war broke out. This disposes of the only suggested infringement of trading with the enemy legislation, regarding the *Glenearn* cargo by itself.

I confess, however, that I have been troubled by the element of exchange or barter, for if the whole exchange agreement is regarded as a single transaction there is the element, to which I have already alluded, that although delivery of, and payment for, the Genoa consignments were made before war and the property in them had passed, it was at least a possible, if not a probable result, that the German subsidiary would thereby be enabled to obtain actual possession, after the outbreak of war, of a large quantity of latex of which they would otherwise have been deprived. But no evidence was tendered by the Crown on this point, nor was any application made to cross-examine the claimants on their affidavits; and no great stress was laid on the fate of the Genoa consignments, whatever the facts regarding them might prove to be; the real emphasis was all upon the defeat of the potential rights of capture of the *Glenearn* cargo.

On consideration I am satisfied that it must always have been intended to carry out the so-called exchange agreement by separate transactions under the German agreement. In my opinion the German subsidiary's letter of August 30, the express object of which is to alter the price-fixing date in respect of the whole of the *Leverkusen's* cargo so as to coincide with that in respect of the *Glenearn's* cargo, supports this view. I think, therefore, that the transaction in respect of the *Glenearn's* cargo stands or falls by itself. I do not overlook the fact, which applies equally whether the *Glenearn's* cargo alone, or the exchange agreement as a whole, is regarded, that

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the date arranged for the price-fixing was September 4. But, although he afterwards withdrew the admission, I think that Mr. MacKenna was right in the first instance in attaching no importance to the point. This revised date was fixed before war broke out. From this the calculation of the respective prices followed automatically under the German agreement, and all questions of weights and analyses would have been settled conclusively before the goods left the claimants' estate. The mere fact that the adjusted balance of the price, payable, as proved to be the case, by the claimants, could only, as I assume, be dealt with through the Custodian of Enemy Property, does not seem to me to affect the matter. For the reasons I have indicated I am not prepared to hold that any doctrine of public policy can be invoked by the Crown.

I now turn to the prize law governing the matter. Where under a contract for the sale of goods made before the outbreak of war between an enemy seller and a neutral buyer the transfer of the property in the goods is made while the goods are still in transitu, the following propositions appear to be clearly settled :—

First : If it is proved that the contract was made in the ordinary course of business and not in contemplation of war, and was a bona fide transaction in the sense that there was no fraudulent or collusive reservation of interests to the seller, then although the buyer has not taken actual delivery before seizure, his claim is recognized in prize.

Second : If, however, the contract, though made bona fide in the above sense, was made in contemplation of the outbreak of war the buyer cannot establish his claim to the goods unless he has taken actual delivery before seizure : see for example : *The Jan Frederick* (1), *The Baltica* (2), *The Southfield* (3), *The Daksa* (4), and *The Kronprinsessan Margareta* (5).

These provisions are subject in the case of a British buyer

(1) 5 C. Rob. 127.
(2) 11 Moo. P. C. 141.
(3) [1917] A. C. 390*n* ; 1 B. & C. P. C. 332.
(4) [1917] A. C. 386.
(5) [1921] 1 A. C. 486, 499 ; 3 B. & C. P. C. 803, 814.

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to at least two qualifications: first, no considerations founded on the comity of nations can apply; and secondly, a British claimant is subject, as a neutral claimant is not, to the municipal law concerning trading with the enemy, so far as it affects the matter. But it does not seem to me that these qualifications afford any reason for putting a British subject in a more favourable position as regards transfer in transitu than a neutral would be. Mr. Miller admitted, nor could I possibly hold otherwise on the facts, that this transaction was made in contemplation of war between Great Britain and Germany, and, incidentally, in the expectation of Italy being immediately involved. It follows that nothing less than actual delivery will avail the claimants. Mr. Miller argued, and desired to reserve the point if it was not open to him in this Court, that the term transit, in prize law, only applies to goods which were at sea at the outbreak of war. He founded this argument on a passage in *The Roumanian* (1), referring to enemy goods on British ships "whether on board at "the commencement of hostilities or embarked during "hostilities"; (see also the words "while at sea" in the passage cited in *The Kronprinsessan Margareta* (2)). It may be an interesting question whether these expressions can be taken literally without the qualification provided by passages in *The Roumanian* (3), to the effect that goods warehoused in a port or harbour of the realm at the outbreak of war are regarded as still being in transitu (see, in particular, the reference to *The Marie Anne* in *The Roumanian* (3) and the words "so long "as the original transitus is deemed to continue" used by Lord Sumner in *The Vesta* (4)). In the view I take of this case it is not necessary to express a final opinion on the point, or upon Mr. Miller's contention that actual delivery took place in the Port of London Authority's warehouse. I will merely assume in favour of the Crown, but without being taken to express any real doubt that the assumption is correct,

(1) [1916] 1 A. C. 124, 136; 1 B. & C. P. C. 536, 546.

(2) [1921] 1 A. C. 486, 499; 3 B. & C. P. C. 803, 814.

(3) [1916] 1 A. C. 124, 136, 141, 143; 1 B. & C. P. C. 536, 551, 553.

(4) [1921] 1 A. C. 774, 776; 3 B. & C. P. C. 897, 899.

that in the Port of London Authority's warehouse the goods were still in transit, and that if they had been seized there the claimants would have failed. But they were not seized until the claimants' warehousemen had removed them and taken them into store in their own warehouse. Mr. MacKenna, relying on *The Bawean* (1), argued that delivery to agents could not avail the claimants. But every company must act through human agents, and in this case the evidence is uncontradicted that the claimants have no warehouse of their own and invariably store with this, or another named, warehouse company. Symbolic delivery, in accordance with the custom of merchants, by the transfer of shipping documents, whether personally or by agents, is on one side of the line; and I will assume, again without expressing a final opinion, that constructive possession by an agent for the purpose, and in the course, of delivery to the claimants' own warehouse would be on the same side of the line. In this case, however, I think that the claimants took actual delivery, at the latest, on the arrival of the goods at the warehouse of their warehousemen, in the only way in which, as a matter of practical business, in their individual circumstances, they could take actual delivery of the goods. This seems to me to be on the other side of the line, and this had been done before seizure by the Crown.

This view of the matter is, I think, supported by the judgment of Lord Sumner in *The Vesta* (2).

For these reasons I hold that the claimants have established their claim and are entitled to judgment for the release of the goods accordingly. No order as to costs.

Judgment for claimant.

Solicitor for the Procurator-General: *Treasury Solicitor.*

Solicitors for the claimants: *Mayo, Elder & Co.*

(1) [1918] P. 58; 3 B. & C. P. C. 116.

(2) [1921] 1 A. C. 774, 786; 3 B. & C. P. C. 897, 908.

E. C. M. T.

1941
Feb. 26.

CHADBURN *v.* CHADBURN.

Divorce—Judicial separation—Desertion as a ground—Same period as for divorce—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 185, sub-ss. 1, 2, as amended by Matrimonial Causes Act, 1937 (1 Edw. 8 and 1 Geo. 6, c. 57), s. 5, sub-s. 1.

By the substitution in s. 5 of the Matrimonial Causes Act, 1937, of a fresh provision for sub-ss. 1 and 2 of s. 185 of the Judicature (Consolidation) Act, 1925, the former ground for a judicial separation—desertion for not less than two years during the marriage—has been repealed.

Under the new sub-s. 1 of s. 185 "a petition may be presented "to the court either by the husband or the wife on any grounds "on which a petition for divorce might have been presented . . . ."

The last four words mean "might have been presented under "the provisions of this Act," and inasmuch as desertion for at least three years immediately preceding the presentation of a petition is a ground for dissolution of marriage under s. 176 (*b*) of the Judicature (Consolidation) Act, 1925, as amended by s. 2 of the Matrimonial Causes Act, 1937, it is equally a ground for judicial separation.

WIFE'S PETITION for judicial separation.

In this petition Mrs. Diana Herbert Chadburn, of Duton Hill, Dunmow, Essex, prayed for a decree of judicial separation from her husband, Mr. Marcus Mowbray Chadburn, on the ground of desertion for three years and upwards immediately preceding the presentation of the petition. The petition was not defended.

The marriage took place at the Holborn register office in June, 1933, and there was one child. The respondent deserted the petitioner in May, 1935, and never returned to her.

G. C. Tyndale for the petitioner. A former ground for judicial separation created by the Matrimonial Causes Act, 1857, and reproduced in the original s. 185 of the Judicature (Consolidation) Act, 1925, was desertion for not less than two years during the marriage. That section was in effect repealed by the substitution of a new section under s. 5 of the Matrimonial Causes Act, 1937. The words "might have been presented" should be interpreted as meaning presented under the Act of

1937. Sect. 2 of that Act provides that desertion as a ground for divorce must be for at least three years immediately preceding the presentation of the petition, and therefore there must be the same minimum period of desertion next preceding the petition as a ground for judicial separation.

1941. Feb. 26. HODSON J. This is a petition for judicial separation on the ground of desertion for three years and upwards immediately preceding the presentation of the petition. The suit is brought under the Matrimonial Causes Act, 1937, s. 5, which substitutes sub-s. 1 for sub-ss. 1 and 2 of s. 185 of the Judicature Act, 1925. The right to a judicial separation on the ground of desertion without cause for not less than two years, which was first given by the Matrimonial Causes Act, 1857, and was contained in s. 185, sub-s. 1, of the Act of 1925, is thus taken away by the Act of 1937, and the substituted provision is a follows:

"A petition for judicial separation may be presented to the "court either by the husband or the wife on any grounds on "which a petition for divorce might have been presented, or "on the ground of failure to comply with a decree for restitution "of conjugal rights or on any ground on which a decree for "divorce a mensa et thoro might have been pronounced "immediately before the commencement of the Matrimonial "Causes Act, 1857, and the foregoing provisions of this Part "of this Act relating to the duty of the court on the "presentation of a petition for divorce, and the circumstances "in which such a petition shall or may be granted or dismissed, "shall apply in like manner to a petition for judicial "separation."

"Divorce" clearly means throughout this Act, unless it otherwise appears, divorce a vinculo, and the only question which arises is the meaning of the words "might have been "presented." It has been suggested that the words "might "have been presented" mean "might have been presented "before the passing of this Act"; but it is to be noted that under the sub-section which I have read there follows a phrase in which a decree for divorce a mensa et thoro is referred to

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as one which might have been pronounced immediately before the commencement of the Matrimonial Causes Act, 1857.

Those words "immediately before the commencement of "this Act" are not used in conjunction with the words "might "have been presented" in reference to the petition for divorce, and it appears to me that the words "might have been "presented" must therefore mean "might have been presented "under the provisions of this Act."

In those circumstances, there being a provision in s. 2 of the Act of 1937 that three years' desertion immediately preceding the presentation of the petition shall be a ground for divorce, it follows that a judicial separation can be pronounced on the same grounds.

I find no difficulties about the facts of this case. There has clearly been three years' desertion immediately preceding the presentation of the petition, and therefore there will be a decree of judicial separation, with costs, and custody of the child.

Decree of judicial separation.

Solicitors: *White & Co.*

W. L.

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April 29.

Justices—Husband and wife—Maintenance order—Deduction of tax from payments—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39), *s.* 5 (*c*).

In making an order for maintenance under s. 5 (*c*) of the Summary Jurisdiction (Married Women) Act, 1895, a court of summary jurisdiction should, in the absence of special circumstances, follow the practice of the Divorce Division and direct that the payments to be made by the husband under the order should be less tax. Preferably this should be done by express provision in the order, but if an order is made for a weekly payment without qualification its effect by implication will be that the payment is to be made less tax.

Where the case falls within r. 19 of the All Schedules Rules in the Income Tax Act, 1918, the payment by the husband being made "wholly out of profits or gains brought into charge to "tax," the husband has an option whether or not he will deduct the tax. Where the case falls within r. 21 of the All Schedules Rules, the payment by the husband not being made out of profits or gains brought into charge, the husband is obliged to deduct the tax.

If a husband, in a case which falls within r. 19, elects to make the payments under the order without deduction of tax, he is entitled at any time to change that method of payment as regards the future, but he cannot set off deductions of tax which he might have made in respect of past payments against arrears under the order.

A maintenance order made by a court of summary jurisdiction had impressed on it with a rubber stamp the following marginal note: "For income tax purposes this order shall be regarded as "having been made on the Dayrell-Steyning basis," the intention being to convey that payments under the order were to be made free of tax:—

Held, that in no circumstances was this a proper way of providing that payments under the order should be made free of tax, since the meaning of the marginal note was obscure to lay persons and the use of a rubber stamp tended to prevent the consideration of each individual case in connection with the incidence of taxation.

Dayrell-Steyning v. *Dayrell-Steyning* [1922] P. 280 no longer prescribes the practice of the Divorce Division with regard to the making of orders for maintenance free of tax.

Quaere, whether a court of summary jurisdiction has power to make an order for the payment by a husband, free of tax, of maintenance at the rate of 2*l.* a week, the maximum sum permitted by s. 5 (*c*) of the Summary Jurisdiction (Married Women) Act, 1895. However this may be, it is extremely undesirable that such an order should be made.

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APPEAL from order of a metropolitan magistrate.

On April 16, 1940, on a summons by the wife against the husband for maintenance on the ground of his wilful neglect to maintain her, the magistrate of the South-Western metropolitan police court made an order for the payment by the husband to the wife of 10*s.* a week, there being no reference in the order to payment of income tax on that sum. On December 13, 1940, on an application by the wife for the amount payable under the order to be increased, the magistrate made an order increasing the payment to be made by the husband to 2*l.* a week. This order had impressed on it with a rubber stamp the following marginal note: "For income tax "purposes this order shall be regarded as having been "made on the Dayrell-Steyning basis," the intention being to convey that payments under the order were to be made free of tax.

The husband appealed against the order of December 13, 1941, on the grounds that the magistrate had no jurisdiction to make an order for the maximum payment under s. 5 (*c*) of the Summary Jurisdiction (Married Women) Act, 1895, free of tax, and that, in any case, the amount ordered to be paid was excessive.

The appellant husband in person.

G. C. Tyndale and *C. O. Herd* for the respondent wife.

THE PRESIDENT (LORD MERRIMAN). This is a husband's appeal from an order of the magistrate sitting at the South-Western police court whereby maintenance at the rate of 10*s.* a week, payable under an order made in favour of the wife in April, 1940, was increased to 40*s.* a week.

The first order on the face of it was for 10*s.* simply. An order in those terms is invariably read as being an order to pay "less income tax." That is to say, it entitles the husband, if the payment is made out of profits or gains brought into charge to tax under r. 19 of the General Rules applicable to All Schedules to the Income Tax Act, 1918, to deduct the tax before payment, but he is not obliged to do so. If, on the other

hand, the payment is made out of income which, to quote the words of r. 21 of the General Rules, is not paid "out of profits "or gains brought into charge," he is obliged to deduct tax before payment.

The order under appeal, by which the amount of the maintenance was increased from 10*s.* to 40*s.*, has no express qualification in respect of tax, but by a marginal note impressed by what appears to be a rubber stamp in common use, it is stated that "For income tax purposes this order shall be regarded as "having been made on the Dayrell-Steyning basis." As I understand the effect of that marginal note, the intention is to declare, in the words of Sir Henry Duke P. in *Dayrell-Steyning* v. *Dayrell-Steyning* (1), that, the husband's liability to taxation having been taken into account in calculating his income, the proportion of that income payable to the wife should also be tax free. In other words, by a rubber-stamp reference to a case which, perhaps, practitioners can identify, but which might not be very clear to ordinary members of the lay public, it is intended to make this order for the payment of 40*s.* a week "free of tax." I wish to say, before I go any further into this matter, which I consider is one of some importance, that in no circumstances is that a proper way in which to make an order that maintenance shall be paid free of tax. It seems to me to be undesirable in at least two ways. First, it is obscure to any but practitioners who are acquainted with a decision which is now nearly twenty years old. Manifestly it is obscure to those members of the lay public who are chiefly concerned in the variation of the order. But it would seem also to have a second objection, which appears to me to be fundamental. In this Division, all those who are concerned with the making of maintenance orders, whether they be the registrars or the judges of the Division, are scrupulously anxious to consider the bearing on each individual case of the law relating to income tax. In these days of high taxation a provision regarding the payment of tax is a very important factor in the wording of any order and I have the strongest objection to anything which even remotely

(1) [1922] P. 280.

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savours of, and still more which literally contains, the rubber-stamp element in connection with the making of these orders.

Mr. Tyndale has not sought to defend the additional burden on the husband which is involved in the assumption that this is an order for maintenance to be paid free of tax. I need not, therefore, discuss the merits of that, but I cannot part with this matter without making some general observations. The husband, who has appeared in person, has raised the point that it is outside the jurisdiction of the magistrate to make the order, which is for the maximum sum permissible under s. 5 (*c*) of the Summary Jurisdiction (Married Women) Act, 1895, and at the same time to impose the extra burden involved in paying that sum free of tax. There is some support for that argument in *Clack* v. *Clack* (1), a decision of the Divisional Court of the King's Bench Division, that where a magistrate makes a maintenance order directing a husband to pay a weekly sum to the wife the husband is entitled to deduct income tax from that sum. In passing, I observe that in the report the two rules of the All Schedules Rules in the Income Tax Act, 1918, to which I have referred are quoted without showing the material distinction between them, namely, that the one applies to cases where the payment is made out of profits or gains brought into charge to tax while the other applies to cases where the payment is not made out of such profits or gains. On this question of jurisdiction Lawrence J. says: "I only wish to add that it is impossible to "construe the magistrate's order, having regard to the decision "in *Smith* v. *Smith* (*No.* 2) (2), as an order to pay 30*s.* a week free "of income tax, or that such sum should be paid as would bring "to the wife a clear 30*s.* a week." *Smith* v. *Smith* (*No.* 2) (2) decided, in effect, that an order for the payment of a certain amount without specifying that it is to be free of tax is an order "to pay less tax." Lawrence J. continues: "But I do not agree "with Mr. Acton Pile's contention that the magistrate could "not have made such an order, had he desired to do so, provided "always that the total burden on the husband did not exceed

(1) [1935] 2 K. B. 109. (2) [1923] P. 191.

"40s. a week." It will be observed there that the stress is on the total burden on the husband. I prefer to leave open the question, which is not necessary to our decision, whether there is any such limitation in law. The material words of s. 5 of the Act of 1895, are that a "court of summary juris-"diction . . . . may make an order . . . . containing . . . . "(*c*) a provision that the husband shall pay to the wife . . . . "such weekly sum not exceeding 2*l*. . . . . as the Court shall ". . . . consider reasonable." I wish to reserve the question whether an additional burden borne by the husband in the name of taxation, and in certain circumstances recoverable by the wife in the name of over-paid taxation, in addition to the weekly sum payable to her, can be said to bring the amount of the order above the limit prescribed by the section. I am content to leave the point there because I am satisfied beyond the slightest shadow of doubt that it is extremely undesirable that any such order should be made.

I have said something about the addition by a rubber stamp of the provision that the payment shall be made " free of tax," and I wish now to explain in a little more detail why this procedure seems to me to be completely wrong. *Dayrell-Steyning* v. *Dayrell-Steyning* (1), which appears to have governed the procedure in the South-Western police court ever since it was decided, came before the court in 1922. Since then there have been changes in the law relating to income tax, increases in the rate of taxation, and there has also been, if not a change in the law, a very important declaration of the law which has a considerable bearing on this matter. I refer to the decision of Finlay J. in *Spilsbury* v. *Spofforth* (2). That case—which, I think, only declared the law as it was known to be, but applied it more particularly to maintenance orders of this character—decided that when a wife has obtained a maintenance order declared to be free of tax, she alone can recover income tax overpaid in respect of payments under the order and recover it on her own behalf. To put it into practical form, on an order such as that with which we are dealing here, with tax at the rate of 10*s*. in the £, the payment being made

(1) [1922] P. 280. (2) (1937) 21 Tax Cas. 247.

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out of income brought into charge to tax, the husband has to pay the tax on 4*l.* of income, that is, 2*l.* of tax to leave a net sum of 2*l.* for the wife. If the wife has no separate income and has not already exhausted her reliefs under the Income Tax Acts, she can demand from the revenue authorities repayment of the tax as tax overpaid on her income, as, indeed, the annuity is, so that she both receives the 2*l.* net and recovers the tax thereon which the husband has had to pay. The unfortunate husband suffers all the detriment. Whether or not that was recognized before it was so plainly declared by Finlay J., it has been clearly appreciated in this Division since his decision and, while *Dayrell-Steyning* v. *Dayrell-Steyning* (1) laid down what Sir Henry Duke P. thought would be the proper practice in this Division in the circumstances prevailing in 1922, it has to my knowledge ceased to govern the practice of this Division for some years past.

It is unnecessary to allude to the criticisms of *Dayrell-Steyning* v. *Dayrell-Steyning* (1) made by Finlay J. in *Spilsbury* v. *Spofforth* (2). The practical point, so far as this decision is concerned, is that since the effect of the combination of higher taxation with the implications of a tax-free order was so plainly declared by Finlay J. in *Spilsbury* v. *Spofforth* (2), so far from the tax-free order being the practice of this Division, it is the rarest possible thing for a registrar or a judge to make it. If, therefore, the application of the rubber-stamp in the South-Western police court is intended to signify adherence to the practice of the Divorce Division, it is a misconceived effort, and the sooner it is abandoned the better. Speaking generally, I see every reason why courts of summary jurisdiction, whether in the metropolis or elsewhere, should follow the general practice in vogue in this Division, of making orders less tax, either expressly or impliedly. It is best if the fact that the order is for payments less tax is made clear by express provision in the order to that effect, but I do not lay any stress on that because it is plain that an order to pay so much a week without qualification is an order to pay "less tax," it being obligatory to do so if the fund out of which the payment is made has not

(1) [1922] P. 280. (2) 21 Tax Cas. 247.

been brought into charge to tax and optional if fund has been brought into charge to tax.

A minor point arises on the exercise of that option. A committal order was made against the husband here because he had set off against certain alleged arrears under the 10*s.* order deductions of tax in respect of past payments. He was wrong in doing so, but not for the reason given by the magistrate, which is only one more illustration, if it is needed, of the vice of this rubber-stamp procedure, because the magistrate assumed, contrary to the fact, that the order for the 10*s.* a week had also borne the impress of this rubber stamp allusion to *Dayrell-Steyning* v. *Dayrell-Steyning* (1) which, in fact, it had not. The real reason why the husband was wrong was that, not being obliged to deduct the tax—the case falling within r. 19 of the All Schedules Rules and not within r. 21—and not having elected to do so, he had gone back on his election to pay without deduction. He was entitled to change his method of payment for the future, but not to exercise retrospectively a right to deduct and retain the amount of tax as against payments accruing due thereafter. The following passage in the judgment of Slesser L.J., in *Taylor* v. *Taylor* (2) puts the matter beyond doubt: "By the sub-rule already "mentioned the defendant was entitled on making each of "these payments to deduct thereout the income-tax thereon, "but he made no deduction of tax from any of these payments. "By August, 1932, he had made payments equalling in amount "the whole of the weekly sums that were due from him down "to that time without making any deduction in respect of "income-tax, and, the right to deduct tax given by the sub-rule "being a right to do so 'on making such payment' and not "otherwise, his right of deduction in respect of those payments "was gone."

I introduce that point because it emphasizes the undesirability of the method of making orders which was adopted here. I see every reason why the practice in courts of summary jurisdiction should conform to the practice now in vogue in this Division, and I can see no reason to the contrary.

(1) [1922] P. 280. (2) [1938] 1 K. B. 320.

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Indeed, in this Division it is recognized that it is more especially important, when dealing with small orders, and with parties with small incomes, that this element of subjection to tax in addition to the order should not be inflicted on the husband in the present state of taxation. An order is made which, by the subsequent introduction of a new Finance Act, may a month later impose automatically an increased and unanticipated burden on the husband and give the wife a substantial unearned increment on her order. I do not lay down that there should never be any departure from the practice which I am suggesting should be followed. That must depend on the circumstances of the case, but the general rule should be to make orders uncomplicated by the provision that they are to be free of tax.

[His Lordship dealt with the contention by the husband that the order was excessive in amount, apart from the question of tax, and said that the Court had before it no material on which it could satisfy itself that that was so. He added :] The matter, therefore, falls to be decided simply on the point that it must be made clear that the order is enforceable " less "tax," and not " free of tax."

The appeal will be allowed to the extent necessary to bring about that variation.

LANGTON J. I agree. This case has one aspect of no small importance and I wish to emphasize and indorse what my Lord has said concerning the Dayrell-Steyning rubber-stamp. There appears to be no reason to suppose that the *Dayrell-Steyning* decision (1), in its day, was not, as so many of Lord Merrivale's judgments were, most useful and thoroughly to the point. It declared, no doubt, in those days, the practice of this Court, but it is nineteen years old and since it was given the whole scope of taxation has altered in almost every aspect —in quantity, in incidence and in ambit. In the last few years the whole scheme of taxation in this country has been greatly varied. It results, therefore, that to-day the *Dayrell-Steyning* decision (1), so far from being a guiding lamp in this Division,

(1) [1922] P. 280.

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is no longer followed. I wish to indorse also what my Lord has said about the grave disadvantages of the employment of anything in the nature of a rubber-stamp in dealing with cases of this class. The sooner this particular rubber-stamp is resolved into its original elements and handed over to the local salvage officer for war purposes, the better I shall be pleased. Save as to the matter of income tax I agree with the result at which the magistrate arrived.

Order varied.

Solicitor for the respondent : *H. C. L. Hanne & Co.*

(1) [1922] P. 280.

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April 9.

MILLIGAN *v.* MILLIGAN.

Divorce — Desertion — Restitution of conjugal rights — Jurisdiction — Matrimonial home when cohabitation ceased—Meaning.

In relation to the jurisdiction of the Divorce Court to entertain a petition for restitution of conjugal rights, the matrimonial home of the parties is prima facie where the husband resides. If there are no good reasons why a joint home is not set up there and the husband fails to set up one, the inference is that he has ceased cohabitation where he ought to have set up the joint home. The phrase "matrimonial home" extends in relation to jurisdiction to the husband's residence in England in such circumstances that any husband similarly circumstanced and not estranged from his wife would set up his home here.

Dictum of James L.J. in *Niboyet* v. *Niboyet* (1878) 4 P. D. 1, 4, applied.

ISSUE of jurisdiction in a suit for restitution of conjugal rights.

The following statement of facts is taken, with slight alteration, from the judgment:

Mrs. Kathleen Knubley Milligan, of Kendal, petitioned for restitution of conjugal rights, alleging that the respondent, her husband, Lieutenant-Colonel Eric David Milligan, had left her in October, 1938, and refused to return to cohabitation. The husband appeared under protest, on the grounds that (1.) he was domiciled in Scotland; (2.) the parties were not both resident in England at the time of the institution of the suit; and (3.) the parties did not have a matrimonial home in England when cohabitation ceased. It being conceded that the husband was neither domiciled nor resident in England when the suit was instituted, the Court ordered that an issue be tried on the third ground. It was directed that the husband should be plaintiff and the wife defendant.

The respondent was at all material times an officer in the Royal Artillery. That profession required him to dwell in various places, and his habitat was uncertain in site and duration. Down to the early part of 1937 he was stationed in Ceylon and the petitioner was with him there. In the spring of that year she returned to England with the son of

the marriage, and in October the respondent came home on leave and the parties established themselves in a furnished flat in Edinburgh. While they were in Edinburgh the respondent was appointed to a command at Lichfield, and they went there. They established themselves, first, in two bedrooms and a sitting room at an hotel in Lichfield, where they remained for a couple of months. They then took a furnished house in Lichfield where they used their own plate and linen, for another two months or so. During that time the respondent was expecting to be seconded for a senior officer's course at Sheerness, and in May, 1938, he went thither to take that course. While he was there the petitioner, finding the accommodation at the furnished house larger and more expensive than was needed for herself and her son during the husband's absence, went, with the respondent's consent, back to the hotel. There she remained with her son awaiting the conclusion of the respondent's course at Sheerness, and the spouses did not meet, except for one week-end spent at Larkhill, till July 7, when the respondent rejoined his wife at the hotel at Lichfield. They continued there until the end of July, when, the boy's holidays having begun, and the respondent's duties still detaining him in Lichfield, mother and son left Lichfield on visits to friends or relations. She, however, spent one night—that of August 9—with her husband at Lichfield, where she broke one of her journeys between visits.

Meanwhile the respondent got an appointment which took him to Pembrokeshire for two or three weeks. While he was stationed there he joined his wife for one night in Dorsetshire, where she was staying. From Pembrokeshire the respondent was recalled to Lichfield. While there he received the promotion which he had been expecting and to which the senior officer's course was the preliminary, and early in October he was ordered to Blackdown. While there he lived in the officers' mess. Meanwhile, the petitioner and the son had remained in Dorset, but, on the respondent's being posted to Blackdown, the petitioner went to Camberley to look, with the respondent, for accommodation in which

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to re-establish the household. It was then that the respondent declared his intention, which he had formed when he went to Blackdown, of not living again with the petitioner.

Hon. Victor Russell for the plaintiff.
G. C. Tyndale for the defendant.

Cur. adv. vult.

April 9. HENN COLLINS J. read a judgment in which, having stated the facts summarized above, he said: The matter for decision arises wholly on the issue whether the spouses had a matrimonial home within the jurisdiction at the time when cohabitation ceased. This is a mixed question of fact and law. What is meant, in relation to the jurisdiction of the Court by the phrase, a matrimonial home, is a question of law. Whether the spouses had such a home when cohabitation ceased is a question of fact and before that can be answered it must be ascertained at what date cohabitation ceased.

The first question therefore is: When did cohabitation cease? On the one hand, it is said that it ceased either on or about August 9, the last occasion when marital intercourse took place, or the later week-end in Dorsetshire, when there were no signs of unfriendliness, but which was the last occasion on which the parties were together under one roof. On the other hand, it is said that it did not cease before early October at Camberley, while the respondent was living in the officers' mess at Blackdown, and had no other abode. I think that this latter view is the assumption on which I must proceed, for I can assign no earlier date with certainty. It is clear, I think, that a state of cohabitation existed down to that date, and that there was a matrimonial home at Lichfield so long as the respondent was there. It would not take much to persuade me that it was there that he formed the intention of no longer living with his wife, and that, consequently, it was there that cohabitation ceased. But, as I have said, I have no certainty of that, and must proceed on the other footing.

Had the husband a matrimonial home in England, circumstanced as he was, at Blackdown? That must depend on what is meant by the expression "matrimonial home" in this connection.

If it means a dwelling which was being occupied by the spouses when cohabitation ceased and nothing else, as was contended on the part of the respondent, there was no matrimonial home at Blackdown, for the spouses never lived together there. But have the words no wider meaning in such a connection? Bearing in mind that the petitioner is seeking a remedy for desertion, and that desertion is not from a place, but from a state of things, it would be remarkable if an element, unessential to the offence for which relief is sought, should be an essential of the jurisdiction.

I am considering the extent of the old ecclesiastical jurisdiction which this Court has inherited, and which it administers to-day in such suits as this, with only certain statutory modifications immaterial on the question of jurisdiction. That jurisdiction was circumscribed by the Statute of Citations which confined it to those inhabiting and dwelling in the diocese of the Court issuing the citation. There is no hint that any conjoint dwelling or, still less, conjoint "home" was required, but only such physical presence of the respondent as should amount to inhabiting or dwelling. It is true that in *Niboyet* v. *Niboyet* (1), James L.J. says: "If I were asked to define, and it were necessary to "define, what in the particular case of matrimonial infidelity "constituted a matter matrimonial in England at the time "when the Act was passed, I should define it to be a case of "infidelity where the matrimonial home was in England— "the matrimonial home in which the offended husband ought "to be no longer bound to entertain the unchaste wife, or in "which the chaste and offended wife ought to be no longer "bound to share the bed and board of the polluted husband— "the matrimonial home, the purity of which was under the "watch and ward of the church there." That passage, no doubt, seems to contemplate a common dwelling as a test of

(1) (1878) 4 P. D. 1, 6.

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the jurisdiction, but it must be read in its context. The learned Lord Justice was really attributing the jurisdiction in favour of which he was arguing to the residence of the wrongdoer, as appears by the passage immediately preceding the one which I have quoted, and reference to the report of the case in the Court below makes it clear that the parties had never lived together in this country.

Again in *Armytage* v. *Armytage* (1), Gorell Barnes J. says: "In my opinion, if the parties had a matrimonial home, "but were not domiciled within the jurisdiction of an "Ecclesiastical Court, that Court would have interfered, if "the parties were within the jurisdiction at the commencement "of the suit, to protect the injured party against the other "party in respect of the adultery or cruelty of the latter . . . ." There was no matrimonial home in the physical sense in this country in that case, and the decision rested on the fact that both parties were residing here at the commencement of the suit. It, therefore, throws no light on what is meant by "matrimonial home." One meets the phrase again in relation to service of process out of the jurisdiction in *Perrin* v. *Perrin* (2). Doubts still prevailed as to what facts were essential for such service in suits for restitution of conjugal rights, and to solve them the learned judge propounded certain rules. Those rules have ceased to have effect as such, but I suspect that they have given to this issue the form it takes as they seem to have been taken as defining the jurisdiction, not merely the essentials for service out of the jurisdiction. That case, however, does not define the term "matrimonial "home," nor did the learned judge purport to expand or contract the jurisdiction of this Court by rules of procedure. The jurisdiction must not be measured by the wording of those rules, nor by the phrase "matrimonial home," except in so far as they are found to express succinctly the jurisdiction of the ecclesiastical courts.

I do not think there is a better exposition, in short compass, of that jurisdiction than that given by James L.J. in *Niboyet* v. *Niboyet* (3): "Can there be any doubt that before the

(1) [1898] P. 178, 194.
(2) [1914] P. 135.
(3) 4 P. D. 1, 4.

"English Act of Parliament transferring the jurisdiction "in matrimonial causes, from the church and her Courts "to the sovereign and her Court, the injured wife could have "cited the adulterous husband before the bishop, and have "asked either for a restitution of conjugal rights or for a "divorce a mensa et thoro, and in either case for proper "alimony? The jurisdiction of the Court Christian was a "jurisdiction over Christians, who, in theory, by virtue of "their baptism, became members of the one Catholic and "Apostolic Church. The church and its jurisdiction had "nothing to do with the original nationality or acquired "domicils of the parties, using the word domicil in the sense "of the secular domicil, namely, the domicil affecting the "secular rights, obligations, and status of the party. "Residence, as distinct from casual presence on a visit or "in itinere, no doubt was an important element; but that "residence had no connection with, and little analogy to, "that which we now understand when we endeavour to solve, "what has been found so often very difficult of solution, the "question of a person's domicil."

Except as regards divorce, that passage has been accepted and acted on as good law. Its emphasis is on residence within the jurisdiction, and not on any physical home.

No doubt, a joint dwelling place is the usual concomitant of a state of cohabitation, but it is not an essential. Cohabitation can exist long after, and, indeed, independently of, any joint home, and desertion can be established without reference to it. For the purposes of desertion the matrimonial home is prima facie where the husband resides. There may, of course, be a number of good reasons why a joint home is not set up there, but if there are no such reasons and the husband fails to set up one, the inference is that he has ceased cohabitation, and, if I am asked where he has done so, my answer is where he ought to have set up the joint home.

Having regard to the principles on which the ecclesiastical courts acted, would they have refused jurisdiction merely because the wrongdoing husband, having for some good reason left a joint home within the jurisdiction, had elected to live

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alone elsewhere within the jurisdiction and had failed there to provide a home for his wife? Let me take an extreme case. Suppose a married couple, of foreign domicil, but living here, left their home in one town to go to a new one a few miles away, and that, on the way, the husband deserts his wife. Has she no remedy here? Is she relegated to the tribunals of her husband's domicil? I answer: "No," if only for the reason that the husband cannot be allowed to take advantage of his own wrong. But, in truth, there would be, in such circumstances, a matrimonial home, for, in a sense, the husband carries the matrimonial home on his back. It is where he is, unless there are good reasons why it should not be—as, for instance, that he is a mere sojourner.

In my judgment, therefore, the phrase "matrimonial "home" extends, in relation to jurisdiction, to the husband's residence here in such circumstances that any husband similarly circumstanced and not estranged from his wife would set up his home here. Judged by that rule, the parties had a matrimonial home in or convenient to Blackdown when cohabitation ceased, and I answer the question propounded accordingly.

His Lordship ordered the protest to be struck out, leaving a general appearance to the suit by the husband; the wife was granted her costs of the issue.

Solicitors for the plaintiff husband: *Bertram Sturt, for J. & J. Milligan, Edinburgh.*

Solicitors for the defendant wife: *Turner & Evans.*

W. L.

IN THE ESTATE OF F. E. FAWCETT, DECEASED.

1941
May 14.

Probate — Jurisdiction — Testamentary documents—Construction of documents—Admission to Probate.

Where a question arises which of two or more testamentary documents should be admitted to probate and to whom a grant of administration should be granted, the Probate Court possesses jurisdiction to construe the terms of the documents, and has a duty to exercise that jurisdiction to save the parties the expenses of a suit in the Chancery Division directed to the same limited purpose.

MOTION for grant of probate.

The testatrix, Florence Evelyn Fawcett, died on October 25, 1940, without issue. By a will which she executed on July 16, 1931, she appointed as executors and trustees Barclays Bank, Ld., and her sister, Elizabeth Jane Williams, and, after bequeathing certain specific legacies, she left the residue of her estate to her nieces, Margaret and Sarah Ann Edna Holt. On February 12, 1932, by a codicil the testatrix exercised a power of appointment which became nugatory owing to her predeceasing her sister. On January 12, 1940, she executed a holograph will in pencil in the following terms: "16th "December, 1939. I am feeling very ill at times these days "and have meant to alter or make a fresh will as the one I "made eight years ago was a measure just for the time and "conditions have greatly altered and I may not have the "time to do as I would wish. It is my earnest desire that "my devoted friend Emily Thompson should be recompensed "for the help and comfort she has been to me, also leaving "her home." [There followed the gift of a ring to Emily Thompson and other small gifts, and the will continued:] "All else to be sold and proceeds after debts, etc., Barclays "Bank will do this to Emily Thompson and any money I may "have in bank."

"Finished December 18, 1939. Now to get it signed."

"December 27. Feel very ill. Wish this was signed."

There followed gifts of certain articles to the testatrix's brother, and the signatures of the testatrix and the attesting

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witnesses, and the date of execution, January 14, 1940. The testatrix left about 780*l.* The holograph will was found enclosed in an envelope addressed: "The Manager, Barclays "Bank, Notting Hill Gate, W.11." Barclays Bank, Ld., on motion, prayed the Court to direct whether both the wills of July 16, 1931, and January 14, 1940, should be admitted to probate, or only the latter. In the event of the earlier will being admitted to probate, Elizabeth Jane Williams had expressed her decision to renounce.

William Latey for the applicants. This Court has jurisdiction to construe the effect of these testamentary documents for the purpose of a grant of representation. If the Court is satisfied that the will of January 12, 1940, disposed of all the property of the testatrix, it revoked the will of 1931, although the dispositions in the two testamentary documents differ: *In re Hawksley's Trusts* (1). If the words in the will of January 12, 1940, are taken in their ordinary meaning, it disposes of all the testatrix's property, because, after specific legacies, she gives "all else" to Miss Thompson. *Jones* v. *Treasury Solicitor* (2) is an illustration of the powers of the Probate Court regarding construction.

Jackson Wolfe for Miss Thompson. It would appear that if the usual practice is followed the documents may all have to be admitted to probate.

Ingram J. Lindner (for *E. M. Winterbotham*) for the Misses Holt, residuary legatees under the earlier will, submitted that both wills ought to be admitted to probate.

LANGTON J. [after stating the facts:] Two points have arisen. The first is as to my jurisdiction to deal with the question whether both, or only the latter, of these wills should be admitted to probate. It is clear that I could not decide that matter without construing the terms of the document of January 14, 1940, and it is said that I have no jurisdiction to entertain a question of construction. Where doubt exists it is claimed that I have no option but to admit both instruments.

(1) [1934] Ch. 384. (2) (1932) 48 Times L. R. 615; 49 Times L. R. 75.

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The estate in question is a very small one, and there is no doubt that it would be a hardship to some of the parties concerned if they had to go from this Court without any ruling on the point which is raised here and have the matter debated in Chancery. It does not seem to me, where the question of construction is limited entirely to which of the testamentary documents should be admitted to probate, that this Court ought to refuse a decision. It is not a question of my right to decide it. It is a question of my duty, and I think that I ought to decide it and not put the parties to the further expense of a suit in Chancery. Any other question of construction, or any other interpretation of the documents, whenever it arises, is, as Luxmoore J. pointed out in *In re Hawksley's Trusts* (1), a matter for the Court of Chancery.

I am only assuming the function of construction for this single and simple purpose of deciding which of the documents before me should be admitted to probate, and I find, as it seems to me, authority for that action in the decision of Sir James Hannen in *Dempsey* v. *Lawson* (2), which is cited with clear approval by Lord Gorell in *In the Estate of Bryan* (3). Since that case also deals with other matters germane to the present case, I will take the whole passage from Lord Gorell's judgment (4): "Then coming to decided cases, *Dempsey* v. "*Lawson* (2) is an authority for saying that the fact that a later "will does not dispose of the whole property of the deceased, and "contains no express clause of revocation, will not necessarily pre-"vent it from being treated as revocatory of an earlier document "which did dispose of the whole property. Sir James Hannen "said: 'In support of this contention, Williams on Executors, "'6th ed., p. 150, and the cases there cited, were relied on. "'I assent to the principle expressed in the passage referred to, "'and I have had occasion to act upon it in the case of *In the* "'*Goods of Petchell* (5), but it becomes necessary on the "'present occasion to consider more minutely the nature and

(1) [1934] Ch. 384.
(2) (1877) 2 P. D. 98.
(3) [1907] P. 125.
(4) [1907] P. 125, 129.
(5) (1874) L. R. 3 P. & M. 153.

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"'extent of the inconsistency of a later testamentary instru-"'ment, which will have the effect of revoking an earlier will. "'In this investigation the Court is necessarily called upon to "'put a construction upon the language of the instrument "'in question.' That passage seems to me to make it quite "clear that this Court is not entitled to shirk the question of "construction where it is limited to the point—which is for this "Court—which of two documents is to be admitted to probate. "Sir James Hannen goes on: 'The intention of the testator "'conveyed in that language has to be ascertained by reference "'to the facts in connection with which it is used; but in "'seeking for the true meaning of the testator, the substance "'and not the form of the instrument must be regarded. "'If it can be collected from the words of the testator in the "'later instrument that it was his intention to dispose of his "'property in a different manner to that in which he disposed "'of it by the earlier document, the earlier document will be "'revoked, and this, although in some particulars the later "'will does not completely cover the whole subject matter of "'the earlier.' Sir James Hannen concludes by saying: "'This was decided by Sir Herbert Jenner Fust in *Plenty* v. "'*West*'" (1).

Thus we have authority from Sir James Hannen on the direct point that the Court is not to shirk the question of construction, and Lord Gorell (then sitting as President) accepting what had been said by the earlier judges in this Court.

[His Lordship then examined the language of the will of January 12, 1940, and, on construction, held that it was clear that the testatrix intended to revoke her earlier testamentary dispositions, both the will of July 16, 1931, and the codicil of February 12, 1932. Therefore, the will of January 14, 1940, would alone be admitted to probate as indicating her testamentary disposition. His Lordship added:] Another matter which was raised on this motion was whether Barclays Bank were appointed executors by the later will. I have come to the conclusion that they are. I think that

(1) (1845) 1 Rob. 264.

the reference to them in the unprofessional language of the testatrix—"Barclays Bank will do this"—meant that she thought they would act as her executors, as, indeed, she wished them to act as part-executors under her earlier will. Therefore, in so far as it is necessary to decide that point, I decide also that Barclays Bank are executors according to the tenor of the will of January 14, 1940.

Wolfe. The bank have consented to renounce providing that administration with the will annexed should be granted to Miss Thompson.

LANGTON J. I can do that under s. 162 of the Judicature (Consolidation) Act, 1925. I make no pronouncement concerning the residuary bequest. I only say that she shall have the grant. The bank will lodge a formal renunciation.

His Lordship ordered that the costs of all parties should come out of the estate, Miss Thompson having agreed to pay the expenses incurred by Barclays Bank.

Order accordingly.

Solicitors for applicants: *Langhams & Letts.*

Solicitors for Miss Thompson: *Herbert Z. Deane & Co.*

Solicitors for the Misses Holt: *Waterhouse & Co., for Bickley & Lynex, Birmingham.*

W. L.

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May 14.

BENSON *v.* BENSON (BY HER GUARDIAN).

Divorce — Incurable unsoundness of mind — Care and treatment — Voluntary patient—Previous detention in pursuance of order under Mental Treatment Act, 1930*—Direction of Board of Control— Mental Treatment Act,* 1930 (20 & 21 *Geo.* 5, *c.* 23), *s.* 5, *sub-s.* 13— *Matrimonial Causes Act,* 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 57), *s.* 3 (*a*), (*b*).

On September 29, 1933, the respondent wife was received as a temporary patient into a mental hospital under s. 5 of the Mental Treatment Act, 1930. On March 1, 1934, the Board of Control directed, under s. 5, sub-s. 13, of the Act, that the period of her treatment be extended for three months from March 25, 1934. On May 30, 1934, she was discharged relieved and was admitted into another mental hospital as a voluntary patient. On August 13, 1940, the respondent's husband presented a petition praying for a divorce on the ground that the respondent was incurably of unsound mind and had been " continuously under " care and treatment for a period of at least five years immediately " preceding the presentation of the petition," within s. 176 of the Supreme Court of Judicature (Consolidation) Act, 1925, as substituted by s. 2 (*d*) of the Matrimonial Causes Act, 1937 :—

Held, the direction of the Board of Control was an " order " under the Mental Treatment Act, 1930, within the meaning of s. 3 (*a*) of the Matrimonial Causes Act, 1937 ; that the respondent had been detained in pursuance thereof for a period immediately preceding her treatment as a voluntary patient within s. 3 (*b*) of the Act ; and that the husband, therefore, was entitled to a decree.

HUSBAND'S PETITION for dissolution of marriage.

By his petition, dated August 13, 1940, the husband prayed for a divorce on the ground that his wife was " incurably of "unsound mind " and had been " continuously under care and "treatment for a period of at least five years immediately "preceding the presentation of the petition," within s. 176 of the Supreme Court of Judicature (Consolidation) Act, 1925, as substituted by s. 2 of the Matrimonial Causes Act, 1937 (1).

(1) Under s. 176 of the Supreme Court of Judicature (Consolidation) Act, 1925, 15 & 16 Geo. 5, c. 49, as substituted by s. 2 of the Matrimonial Causes Act, 1937, a petition for divorce may be presented on the ground (inter alia) that the respondent " (*d*) is incurably of unsound " mind and has been continuously " under care and treatment for a " period of at least five years " immediately preceding the pre- " sentation of the petition."

By s. 3 of Matrimonial Causes Act, 1937 : " a person of unsound

On September 29, 1933, the wife was received as a temporary patient under s. 5 of the Mental Treatment Act, 1930, into the County Mental Hospital, Chester. On February 26, 1934, application was made to the Board of Control for an extension of her treatment in that hospital under the provisions of s. 5, and on March 1, 1934, the secretary of the Board of Control issued a direction to the medical superintendent of the hospital in the following terms: "The Board of Control having "considered the application of the husband and the recom- "mendation of the acting medical superintendent of the "County Mental Hospital, Upton, Chester, hereby direct in "pursuance of s. 5, sub-s. 13, of the Mental Treatment Act, "1930, that the period of temporary treatment of Mrs. Florence "Emily Benson be extended for a period not exceeding three "calendar months from March 25, 1934." The wife remained at the Chester hospital until May 30, 1934, when she was discharged relieved and was admitted as a voluntary patient under the Mental Treatment Act, 1930, into the County Mental Hospital, Lancaster, where she had been as a voluntary patient ever since.

In the answer, filed by the guardian ad litem on behalf of the respondent, the issue was joined.

The President heard arguments on the question whether the wife had been "continuously under care and treatment" for the statutory period within the meaning of ss. 2 (*d*) and 3 (*a*) and (*b*) of the Matrimonial Causes Act, 1937 (1).

R. P. Hollins for the petitioner.

Holroyd Pearce for the Official Solicitor, as guardian ad litem of the respondent.

THE PRESIDENT (LORD MERRIMAN) [after stating the facts:] Sect. 3 of the Matrimonial Causes Act, 1937, provides that

"mind shall be deemed to "be under care and treatment (*a*) "while he is detained in pursuance "of any order .... under the "Lunacy and Mental Treatment "Acts, 1890 to 1930 .... (*b*) while "he is receiving treatment as a "voluntary patient under the "Mental Treatment Act, 1930, "being treatment which follows "without any interval a period "of such detention as aforesaid; "and not otherwise."

(1) See note (1), ante p. 90.

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"a person of unsound mind shall be deemed to be under care "and treatment . . . . (*b*) while he is receiving treatment as a "voluntary patient under the Mental Treatment Act, 1930, "being treatment which follows without any interval a period "of such detention as aforesaid; and not otherwise." The words " period of such detention as aforesaid " pick up the provisions of para. (*a*), the relevant words of which are " while "he is detained in pursuance of any order . . . . under the "Lunacy and Mental Treatment Acts, 1890 to 1930." In other words, unless there has been a detention under para. (*a*) immediately preceding the reception of treatment as a voluntary patient within para. (*b*), treatment as a voluntary patient does not satisfy the statutory definition. If treatment as a voluntary patient is so preceded, it does not matter whether the period of treatment as a voluntary patient is long or short, whether it occupies the whole or merely part of the necessary five years. This wife has been a voluntary patient since May 29, 1934. On the day on which she was admitted to the County Mental Hospital, Lancaster, she was discharged relieved from the Cheshire County Mental Hospital, Chester, where she had been received on September 29, 1933, for temporary treatment under s. 5 of the Mental Treatment Act, 1930. The question, therefore, is whether, in the circumstances in which she was then treated, during the period between September, 1933, and the transfer to Lancaster in May, 1934, which followed continuously upon that period, she was being detained in pursuance of an order under the Lunacy and Mental Treatment Acts, 1890 to 1930. It is admitted that during that period she was " detained " within the meaning of s. 3 (*a*) of the Matrimonial Causes Act, 1937. It seems to me to be clear from the frequent use of the word " detained " in several of the sub-sections of s. 5 of the Act of 1930 that reception for the purposes of temporary treatment under that section carries the element of detention. The real question in this case is whether the detention of the respondent was under an " order."

[His Lordship referred to the direction given by the Board of Control on March 1, 1934, and continued :] It follows.

therefore, that when the respondent left the Chester hospital on May 30 and proceeded, without any interruption, direct to the hospital at Lancaster, she left a treatment at Chester which was regulated, and, as I shall show in a moment or two, could only have been regulated, by the direction prolonging her treatment until May 30, and it may be that that is the decisive matter for consideration in this case.

The great majority of cases with which one has to deal under s. 3 (*a*) of the Matrimonial Causes Act, 1937, are those of detention in pursuance of a reception order under the Lunacy Act, 1890, but the material words are not so limited. If it had been intended to confine detention under s. 3 (*a*)—I am deliberately ignoring detention under the Army Act, and so on—to cases where there had been a reception order under the Lunacy Act, it would have been easy to do so. Parliament, however, has not taken that course, but has used the words "any order under the Lunacy Act and Mental Treatment Acts, "1890 to 1930." I am not overlooking the argument of Mr. Pearce that those words may be no more than a picking up of the wording of s. 22 of the Mental Treatment Act, 1930, which provides that the Act "may be cited as the Mental "Treatment Act, 1930, and shall be construed as one with the "principal Act; and the Lunacy Acts, 1890 to 1922, and this "Act, may be cited together as the Lunacy and Mental "Treatment Acts, 1890 to 1930." But that section does not say that none of those Acts may be cited separately, and I assume that in s. 3 (*a*) of the Act of 1937 Parliament meant to include a reference to an order under the Act of 1930 itself. It is conceded by Mr. Pearce that, unless what has happened here amounts to an "order" under the Mental Treatment Act of 1930, there is nothing which he can suggest that could satisfy those words, and I think I ought to see if, without doing violence to the English language, there is not something here satisfying the words which Parliament has deliberately thought fit to include in the Act.

Speaking in the most general terms about the Act of 1930, it may be said that its scheme is to avoid all semblance of compulsion and to encourage people to take early steps

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towards cure of mental disease by the avoidance of the stigma of certification and of any appearance of compulsion. Nevertheless, I think it may fairly be said that, under the euphemisms which we are very wisely enjoined by s. 20, sub-s. 5, to employ for the future in the interests of patients, there is the iron hand of compulsion, however effectually it may be concealed by the velvet glove. Let us look, first, at the provisions with regard to the reception of voluntary patients contained in the first group of sections, of which the most important are ss. 1 and 2. Without going into unnecessary detail, the effect of s. 1 is to substitute the volition of the patient for an order made by some authority, and to substitute the recommendation of a doctor for a certification. It is assumed that the patient has at least sufficient mental capacity to express willingness to undergo treatment, and this status of the voluntary patient may precede, may succeed, or may alternate with, some form of compulsion, either under the Lunacy Act, 1890, or under the later part of the Mental Treatment Act, 1930, to which I am about to refer. Having regard to the provisions of s. 2, sub-s. 3, the treatment as a voluntary patient ought to be replaced by some form of compulsion as soon as the hypothesis of volition ceases to have any reality. That sub-section provides that: "If any person "received as aforesaid becomes at any time incapable of "expressing himself as willing or unwilling to continue to "receive treatment, he shall not thereafter be retained as a "voluntary patient for a longer period than 28 days, and shall, "if he has not been previously discharged, be discharged on "the expiration of 28 days from the date on which he became "incapable of so expressing himself, unless in the meantime he "has again become capable of so expressing himself, or steps "have been taken to deal with him either under the principal "Act as a person of unsound mind or under s. 5 of this Act as a "person who is likely to benefit by temporary treatment."

The respondent in the present case has been assumed to retain that element of volition during the whole period since May, 1934, although I am bound to say that the affidavit evidence, by which I am completely satisfied of her incurable

unsoundness of mind, leads me to doubt whether, at any rate very recently, she can possibly have been capable of exercising the requisite volition. However, I am not concerned with that. It is sufficient to say that it is unquestionably true that she is incurably of unsound mind.

Under s. 5 of the Act of 1930 "a person who is suffering "from mental illness and is likely to benefit by temporary "treatment but is for the time being incapable of expressing "himself as willing or unwilling to receive such treatment "may on a written application duly made in accordance with "the provisions of this section"—and then I emphasize these words—"*but without a reception order*, be received as a "temporary patient for the purposes of treatment" into one of the institutions mentioned in the section of which the Lancaster Mental Hospital is one. Sub-ss. 2 to 4 inclusive deal with the form of recommendation to be made, and s. 5 limits to a very short period the effect of this recommendation unless it is acted on. Sub-s. 6 is very important, for it provides that: "Where a person is received as a temporary "patient under this section, notice of his reception," together with other documents, is to be sent to the Board of Control, and there is a provision that "the Board of Control shall "upon the signed request of any person who considers himself "to be unjustly *detained*"—I emphasize the word "detained" —"under such application or recommendation furnish to "him or to his authorized representative free of cost a copy "of such application or recommendation." It is clear, so far, therefore, that nothing like a reception order is made. Indeed, the idea of a reception order is expressly excluded. The reception for treatment is brought about by an application, a medical recommendation, to be followed immediately by notice to the Board of Control, but it is important to notice that there is a very strict limit on the length of the detention. This is regulated by s. 5, sub-s. 11, which says: "Subject to "the provisions of this section a person received as a "temporary patient may be detained for a period not exceeding "six months but shall not be detained as such for any longer "period." The reference to "the provisions of this section"

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for the purposes of this case is to sub-s. 13, which is in the following terms: "Where it is anticipated that a person who "is undergoing treatment as a temporary patient under this "section will not recover within the period of six months, but "his early recovery appears reasonably probable, that period "may from time to time be extended for further periods of "such length not exceeding three months as may be specified "in directions given by the Board of Control upon the "application of one of the persons mentioned in sub-s. 2 of "this section, made in such form and accompanied by such "evidence or recommendations as the Board may by rules "made under s. 338 of the principal Act prescribe, provided "that such further periods shall in no case exceed six months "in all." It is plain that the extension of three months, in the course of which the respondent went from Chester to Lancaster, was governed by the power given by this sub-section. In other words, the respondent continued in the Chester hospital between March 24 and May 30, 1934, by virtue of the direction given by the Board of Control. To provide for what is to happen after the last possible extension has been exhausted, it is enacted by sub-s. 14: "The Board of Control may at "any time order (i.) that any person received as a temporary "patient shall be discharged; or (ii.) that steps shall be taken "to deal with him under the principal Act as a person of "unsound mind." It will be observed that the phraseology used there—"that steps shall be taken"—is the same as that in s. 2, sub-s. 3, but the steps which can be taken, when the person has already been dealt with under s. 5, as an alternative to immediate discharge can only be those to be taken under the principal Act. Ex hypothesi the powers under the Act of 1930 are already exhausted.

Mr. Pearce says, and, I think, rightly, that the word "order," in so far as it occurs in any relevant part of the Act of 1930, occurs only in sub-s. 14, and no order of that sort has been issued. I see very clearly the difficulty which he has put to me in saying that a voluntary patient is being treated under an order in face of the explicit words that the power to receive a patient for that treatment is to be without a reception order.

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However, I do not think that I am called on in this case to decide that general question, and I propose to reserve any final expression of opinion on it until the point calls for direct decision, but I think it is worth calling attention to the fact that it did not appear to shock the minds of the judges who decided a group of cases under the London Public Health Act, of which *Gebhardt* v. *Saunders* (1) is an example, that it should be held that the word "order" might be taken to include "notice." It is worth recalling that one of the essential steps in the case of a voluntary patient is that notice of the application and the recommendation shall be sent to the Board of Control, who from that moment have to bear responsibilities in the matter, to some of which I have already alluded.

I am not, however, proposing to determine that matter now, because I am deciding, not a case which depends merely on the original reception for treatment under s. 5, but one where the statutory maximum period of the treatment was extended, in accordance with the statute, by direction of the Board of Control, and I find it impossible to say that, from the date when the original period expired and the respondent was detained under the direction of the Board, she was not detained by an order. Mr. Hollins has directed my attention to Murray's Oxford Dictionary, from which it is quite clear, as I should myself have supposed, that in certain contexts "order" and "direction" are interchangeable terms. A "direction" is said to be "an order to be carried out," and "order," for example, so far as the Supreme Court is concerned, is said to be "a direction other than final judgment." I should find it very difficult indeed, for the purposes of this Act, to draw any sensible distinction between a direction of the Board of Control that the statutory maximum period should be enlarged and an order to the same effect.

I think, therefore, that, at least from the moment when that direction came into effect, the respondent was detained in pursuance of an order under the Mental Treatment Act, 1930. That period of detention immediately preceded her

(1) [1892] 2 Q. B. 452.

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treatment as a voluntary patient at Lancaster and, therefore, the statutory conditions laid down in s. 5 of the Matrimonial Causes Act, 1937, are complied with and the husband is entitled to a decree nisi.

Decree nisi.

Solicitors: *Helder, Roberts, Giles & Co., for John A. Behn, Twyford & Reece, Liverpool; the Official Solicitor.*

W. L.

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June 26, 27, 30; July 21.

Shipping—Salvage—Abandonment—Constructive abandonment—Master and half of crew leaving burning ship—Claim by ship's officer against ship—Termination of contract of service.

The plaintiff, the wireless operator on the defendants' steamship A., claimed salvage for services rendered to the vessel after the master and half the crew had left her in circumstances which the plaintiff contended amounted to abandonment. The vessel had caught fire and the whole of her midships was either alight or threatened. The weather was bad and there was a rough sea. The heat of the fire bent the steering rods, and, as it was impossible to get into the engine room to shut off steam, the vessel was driving ahead in irregular circles and completely out of control. The master ordered the two ships' lifeboats to be lowered, and half the crew got into them; he also destroyed his secret documents and took the other ship's papers into one of the boats for preservation. Both boats broke adrift in the heavy sea, but, in the course of one of her circular turns, the A. came close to the boat in which the master was, and he shouted for all hands to jump overboard, adding that the boat would pick them up. The chief officer, however, who had assumed command on board, forbade the crew to jump. Thereafter those left on board organized bucket parties to keep the flames from spreading, and, when the engines eventually stopped owing to lack of steam, anchored the ship which had driven dangerously near land. Later, a lifeboat arrived and offered to take off those on the ship. The chief officer gave every man the option of accepting the offer, but all on board agreed to remain. When the fire had burnt itself out and towage assistance arrived the plaintiff and those remaining on board rendered valuable assistance in getting the ship to port. Meanwhile, the master had been picked up by a steam drifter. He asked to be put back on board his ship, but, owing to his physical condition and the state of the weather, this was impracticable. The court found as a fact that, although the idea of abandonment was in the master's mind before he got into the boat, the decision to abandon the ship was never clearly and definitely taken by him :—

Held, that there was no constructive abandonment of the ship by the master; that neither the order or advice to jump overboard, nor the option given by the chief officer to go in the lifeboat, dissolved the plaintiff's contract of service with the defendants so as to render him a volunteer; and that, therefore, the claim for salvage failed.

ACTION OF SALVAGE.

The plaintiff was the wireless telegraph operator in the steamship *Albionic*, and the defendants, W. H. Cockerline and Co., were the owners of the vessel.

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The following statement of the facts is taken from the judgment: The *Albionic* left Cardiff for Tunis with a full cargo of coal on March 18, 1940. She was a steel screw steamship of 2468 tons gross, 290 feet in length, and fitted with triple expansion engines. Her cargo amounted to 3500 tons and she had in addition 510 tons of bunker coal. She carried a crew of twenty-five hands all told. At about 2.35 A.M. on March 19 a sudden and fierce fire arose in her engine room. The cause of the conflagration was not accurately ascertained, but the chief engineer, who gave evidence, testified that it broke out on the starboard side of the engine room where the oil tanks were situated. Attempts were made to turn off steam, but they were unsuccessful. An S.O.S. signal was sent out on the master's order by the plaintiff and acknowledged by the signal station at Burnham-on-Sea. The *Albionic* at this time was distant off Hartland Point about twelve miles, and was about half-way between Lundy Island and Hartland Point on her way down channel. In a very short space of time the ship was badly on fire with flames rising to the top of the funnel, and the whole of the mid-ship section, comprising the engine room, the galley and the living space, was either alight or was threatened by the fire. The master gave orders to lower the lifeboats to shade deck level to prevent them from being damaged by the flames. This order was carried out, but the weather was bad with a strong wind of moderate gale force blowing from the southward. The sea was rough, there were heavy rain squalls, and the vessel was rolling and pitching in the sea. It soon became apparent that the boats would be in grave danger of being damaged if left at the shade deck level. They were, accordingly, lowered to the water by the orders of the chief officer, concurred in by the master, and two men were ordered to take up position in each boat to prevent them from grinding and bumping against the sides of the vessel. In the meantime, the vessel's helm had become jammed owing to the steering rods being bent by the heat of the fire. Since it was impossible to take any way off the ship owing to the condition of the engine room, the vessel continued to drive ahead, making irregular circles and

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completely out of control. The question of abandoning the ship was freely discussed and the master destroyed his secret documents by causing them to be flung into the engine room fire. At the same time he placed other important papers in an attaché case and took them in person to the port lifeboat with the intention of placing them in the boat for purposes of preservation. Both lifeboats became separated from the vessel, eight of the crew having taken up places in the starboard lifeboat, while the master, the second and third engineers and two others were in the port lifeboat. Handicapped as they were by lack of numbers, those in the port lifeboat had the greatest difficulty in keeping their craft head to sea, and the *Albionic*, in the course of one of her circular turns, came very close to this boat. Owing to the fire in the engine room the ship's dynamo had ceased to function and the ship was without lights. This circumstance had no doubt increased the confusion on board. By the light of the flames, however, the master observed that some of the twelve members of the ship's company who had remained on board were gathered together forward. He shouted for all hands to jump overboard, saying that the lifeboat would pick them up out of the water. The chief officer, however, who had already taken charge on realizing that the master was no longer on board, forbade any of the crew to jump, in the belief, probably well founded, that that action would probably be suicidal in the circumstances. Some four hours later the master and the others in the port lifeboat were picked up by a steam drifter which had gone to the assistance of the *Albionic* when she observed her to be on fire. The master and his four companions were later transferred to the Clovelly lifeboat which had also come out to the assistance of the distressed vessel. This party reached the shore at Clovelly on the day following the outbreak of fire. As soon as he realized that the lifeboats had gone, the chief officer organized a bucket party among those who remained to keep the flames from spreading. There was no pumping power available, and nothing could be done except by means of water man-handled from overside to extinguish the conflagration in the engine

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room. Everyone on board, however, lent a willing hand, and by their efforts there is no doubt that the area of the fire was kept restricted. At about 3.54 A.M. the engines stopped, owing to failure of steam, and both anchors were let go. The vessel had by this time drifted fairly close to Lundy Island, but the anchors fortunately held. At about the same time the Clovelly lifeboat arrived close to the *Albionic* and offered to take the party of twelve remaining on board. The chief officer gave each member of the party the option of accepting this offer, but declared for his own part a determination to remain by the ship, and all those on board agreed to remain with him. By about 9.30 A.M. the fire in the engine room had subsided, and the efforts of the bucket party had prevented it from spreading to the highly combustible cargo, or, indeed, to any serious degree outside the original area. Throughout that day, however, and throughout the next day and until after the vessel had been safely berthed in Swansea on March 21, small bursts of fire were continually breaking out and had to be dealt with and suppressed by those on board. During the day of March 19 those on board the *Albionic* were busy getting tow ropes ready and rigging the hand steering gear, and, when eventually two tugs came up to begin towage, they succeeded after four hours arduous work in cutting the anchor cables by the primitive method of chipping them through by hammer and chisel. The tugs stood by throughout the night of March 19–20, and on March 20 a long and laborious towage began. The wind was still strong, of moderate gale force, and as the vessel had to be steered by hand, at times more than one man was required to hold and manage the wheel. In addition, during the towage, which lasted about twenty hours, the tow ropes parted on eight separate occasions and the work of hauling in and re-securing the tow ropes on each of these occasions fell on the much exhausted remnant of the crew of the *Albionic*.

The plaintiff claimed salvage remuneration for services rendered to the ship after her master and twelve of the crew had left her.

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Hayward K.C. and *Owen Bateson* for the plaintiff.
Sir Robert Aske K.C. and *E. W. Brightman* for the defendants.

[It was argued for the plaintiff that there was an abandonment of the ship in law when the master, owing to the danger to the ship, left her and ordered or permitted members of the crew to leave without hope of returning; that the order given by the master to the remainder of the crew to jump into the water was in itself a direct order to abandon the ship; and that, in any event, the option subsequently given by the chief officer to the crew of leaving the vessel dissolved their contract of service, and entitled the plaintiff to salvage in respect of services rendered by him thereafter. For the defendants it was contended that there was no abandonment, which was a physical fact, and that the ship with twelve of her crew left on board was never deserted; that, if there was an order to abandon, it was not acted on; that the master's departure was involuntary; and that no one accepted the chief officer's invitation to go if he so desired. All the cases cited are fully set out in the judgment.]

Cur. adv. vult.

1941. July 21. LANGTON J. read the following judgment. The plaintiff is a wireless telegraph operator. At the time in question he was serving in that capacity in the steamship *Albionic*. His claim is in respect of salvage services rendered to the *Albionic*, her cargo and freight in the Bristol Channel on March 19, 20 and 21, 1940. The salved value of the *Albionic* was 30,250*l.* and the freight at risk 3123*l.* 15*s.* The cargo owners were of French nationality and they were not before me in the action. Accordingly, I have treated the values at stake as the total of the two sums which I have named, that is, 33,373*l.* 15*s.*

It is comparatively rare nowadays for a salvage case to raise a point of law which requires any prolonged consideration, but since in the view which I take of this case the matters fall to be determined on a question of law, and since the facts on which this question arises are by no means easy to determine,

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I propose to adopt the course of stating, in the first instance, the facts which are agreed, in the second place, the view which I take of the facts which are in controversy, and, finally, the interpretation and application of the relevant principles of law.

The case was introduced to me as a test or representative action. The services rendered by the plaintiff were shared by eleven other members of the ship's company. Among this party was the chief officer, who has unfortunately died by enemy action since the date of the services, the second officer, and the chief engineer. Out of these eleven potential salvors only two or three have given any notice of claims, but if the present claim were attended with success it was understood that further claims would probably follow. The conditions of employment of the plaintiff differed in one material respect from those of any other possible plaintiffs, in that, although his name was borne on the ship's articles as a member of the crew of the *Albionic*, he was in fact employed in the first instance by the Marconi Company, but neither side considered it necessary to differentiate the plaintiff's case from that of the other members of the crew. [His Lordship stated the facts as set out above.] The owners have not sought in any way to call in question, or, indeed, to minimize, the excellent work done by the plaintiff and his eleven companions; their case is that, meritorious and useful as the services were, they are not salvage services in law.

[His Lordship reviewed the evidence and continued:] The conclusions of fact at which I have, accordingly, arrived as regards the matters in dispute are, first, that the decision to abandon the *Albionic* was never clearly and definitely taken by the master. Secondly, that neither lifeboat left the vessel by his command or with his consent, and thirdly, that, whether he fell or slipped in entering the port lifeboat, whether he was struck by a block as he said in one of his statements, or whether he entered the boat in so dazed a frame of mind as to be not clearly conscious of his action, he did not go down into the boat with any clearly formed intention of thereupon leaving the ship.

The law on this subject is to be found in half a dozen cases

which were all cited before me. There is an admirable summary of the whole topic in Kennedy's Law of Civil Salvage, 3rd ed., pp. 95 et seq. The broad underlying principle is that the crew of a ship undertake their special duty to the vessel for better or for worse. They are not entitled to claim as salvors because their ship encounters peril. They are to be taken as pledging the last ounce of strength and service to their ship when they sign on their articles and enter on the voyage. It is true that this solemn covenant between sailor and ship is not indissoluble. The master of the ship can give any member of the crew a full and complete discharge. Abandonment of the vessel, made bona fide under the master's express order and without hope of returning to or recovering the vessel, also discharges the sailor's obligations under the contract. An excellent example of abandonment which effected a complete discharge and was followed by valuable salvage services on the part of some of the ship's company is to be found in *The San Demetrio* (1). But the court has always watched cases of this nature with the utmost jealousy. Were it otherwise the standard of duty which a sailor owes to his ship might be very speedily relaxed and the door left wide open to unmeritorious claims.

The first case, *The Neptune* (2), came before the court on a petition of a seaman claiming wages. The vessel had been wrecked on the French coast and the plaintiff and other members of the crew had expended great labour in saving part of the hull, masts, spars and other appurtenances of the vessel. The court allowed the claim for wages against the proceeds of what had been salved, but at the same time differentiated this claim very clearly from salvage. Lord Stowell points out the difference between a member of the ship's crew and all individuals standing outside the ship's articles in any matter concerning the salvaging of the ship. "What is the obligation "which a mariner contracts with the ship in which he engages "to serve? It is not only to navigate her in favourable "weather, but likewise in adverse weather inducing ship-"wreck, to exert himself, as the Chief Justice expresses it, to

(1) (1941) 69 Ll. L. Rep. 5. (2) (1824) 1 Hagg. Adm. 227, 236.

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"save as much of the ship and cargo as he can. It is part of "his bounden duty in his character of a seaman of that ship. "It is certainly a laborious, and probably dangerous portion "of his service, but certainly not less a service, and a meri- "torious service on those accounts. In performing that duty "he assumes no new character. He only discharges a portion "of that covenanted allegiance to that vessel which he con- "templated, and pledged himself to give in the very formation "of that contract which gave him his title to the stipulated "wages . . . . The doctrine of this court is justly stated by "Mr. Holt—that the crew of a ship cannot be considered as "salvors. What is a salvor? A person who, without any "particular relation to a ship in distress, proffers useful "service, and gives it as a volunteer adventurer, without "any pre-existing covenant that connected him with the "duty of employing himself for the preservation of that ship; "not so the crew, whose stipulated duty it is (to be com- "pensated by payment of wages) to protect that ship through "all perils, and whose entire possible service for this purpose "is pledged to that extent. Accordingly, we see in the "numerous salvage cases that come into this court the crew "never claim as joint salvors, although they have contributed "as much as (and perhaps more than) the volunteer salvors "themselves. I will not say that in the infinite range of "possible events that may happen in the intercourse of men, "circumstances might not present themselves that might "induce the court to open itself to their claim of a persona "standi in judicio. But they must be very extraordinary "circumstances indeed; for the general rule is very strong "and inflexible that they are not permitted to assume that "character. As the law stands, generally they are excluded "from it upon just grounds."

The next case is that of *The Sarah Bell* (1), which was cited by Mr. Hayward on the question of spes recuperandi and has no other relevance to the point here in issue. The only matter in debate in that case was whether the *Sarah Bell*, which was aground on the Haisborough Sands, water-logged, having

(1) (1845) 4 Notes of C. 144.

lost her rudder, and having been abandoned by her crew, was to be treated for salvage purposes as a derelict. Dr. Lushington came to the conclusion that in all the circumstances the *Sarah Bell* was abandoned by her master and crew without hope of return. At the time when that case was determined I can well believe that there would have been few to differ from the judge's decision. To-day, with the vastly improved machinery of salvage, I can very easily imagine that most judges would decide the other way.

The next case is that of *The Florence* (1), a judgment of Dr. Lushington. This case has always been regarded as the locus classicus of this branch of the law. The *Florence* was abandoned by the whole of her crew on the orders of the master, and the steamer *Montrose*, which made apparently no effort to salve the *Florence*, landed her master and crew at Vigo. At that port the master and crew were transferred to another steamer for repatriation. On the day after leaving Vigo, the homeward bound steamer, the *Madrid*, fell in with the *Florence*, and the mate and part of the crew of the *Florence* volunteered to return to the *Florence*, and having boarded her and procured some outside assistance, brought her successfully into Corunna. Dr. Lushington enumerates with precision the four features which are indispensable to a dissolution of a mariner's contract: "First, the abandonment must take place at sea, "and not upon a coast. . . . . Secondly, the abandonment "must be sine spe revertendi; for no one would contend that "a temporary abandonment, such as frequently occurs in "collisions, from immediate fear, before the state of the ship "is known, would vacate the contract. Thirdly, the abandon- "ment must be bonâ fide for the purpose of saving life. "Fourthly, it must be by order of the master, in consequence "of danger by reason of damage to the ship and the state of "the elements." Later, dealing with the nature of the contract, he uses the following language: "Then, assuming "all the circumstances I have stated to be combined, let me, "before I consider whether the contract is put an end to, "inquire what the contract is which is made with the mariner.

(1) (1852) 16 Jur. 572, 573.

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"The contract itself is for the services of the mariner as a "mariner during a given voyage ; the services are not defined "in the contract ; the duration is for a voyage or voyages, "and sometimes for a specified time. In some special cases "provision is made for the termination of the contract on the "occurrence of other circumstances, as the sale of the ship, "or the impossibility of getting a cargo. The services, though "not defined in writing, are so by usage ; and so is the duration "of them in some cases, as in the case of shipwreck, capture, "etc. In shipwreck the contract continues so long as a plank "can be saved. By capture, certainly, if there be no recapture, "the contract is at once put an end to, and this, I apprehend, "whether by an enemy or by pirates." The authority of this case has never been challenged, and the four essentials here stated have been adopted by text writers : see, for example, Kennedy, 3rd ed., pp. 97 and 98. In *The Florence* (1) Dr. Lushington held that all the four essentials which he had enumerated were present, and, accordingly, salvage was awarded to the mate and crew.

The fourth case, *The Warrior* (2), raised the question of a discharge given by the master in a direct form. Whereas, in *The Florence* (1), the contract was held to be discharged by the action of the master in giving a perfectly proper order to abandon the ship in circumstances which fulfilled the other essential prerequisites, in *The Warrior* (2) there was no abandonment at sea because the master and crew left her after she had drifted ashore in calm weather, but, on the other hand, there was an actual discharge given in writing by the master to the officers and crew. Dr. Lushington held that subsequent services rendered by the officers and crew to the ship and cargo were in law salvage services and remunerated them accordingly. This is obviously a rare class of case, but where the discharge is formal and unqualified to the degree found in this instance, and the master was clearly acting within the sphere of his authority as the owner's agent, it would seem that the decision could hardly be otherwise.

(1) 16 Jur. 572. (2) (1862) Lush. 476.

The next decision in order of date is the *Le Jonet* (1), which arose out of a collision between two sailing vessels, the *Le Jonet* and the *Isabellita Blanca*. The *Le Jonet* sustained serious damage forward and her master and all the crew except the mate went on board the *Isabellita Blanca*. The mate, left alone on board, got his vessel before the wind and subsequently hove to and hoisted a signal for assistance. A steamer sighted the *Le Jonet* and sent some of her crew on board, and the mate, with the assistance of the men from the steamer, brought the vessel to a place of safety. The owners, master and crew of the steamer claimed salvage against the *Le Jonet*, and at the hearing of their suit Sir Robert Phillimore pointed out that the mate of the *Le Jonet* was not among the plaintiffs. Counsel for the plaintiffs contended that the mate could not claim salvage reward for services rendered to his own vessel. Counsel for the owners of the *Le Jonet* took the opposite view and asked the court to bear in mind the services of the mate in awarding salvage to the plaintiffs in the action. Eventually, on the judge's suggestion, and by agreement between the parties, the judge assessed an amount which he recommended the owners to give to the mate by way of salvage, the owners having agreed to be bound by such an award. Sir Robert Phillimore, basing himself on the judgment of Dr. Lushington in *The Warrior* (2), found that the mate was entitled to salvage on the ground that the abandonment of the vessel had terminated his contract. He found in terms that the mate stayed on board voluntarily, and that, as he was no longer bound to serve the ship, he should be regarded on the same footing as a volunteer acting outside the contract.

Finally, the whole matter was considered in recent times by Hill J. in *The Portreath* (3). In that case the steamship *Portreath* was the victim of a severe collision which caused a large hole in her starboard side in the way of no. 1 hold. The hold filled with water, and a quantity of the cargo was washed out, while the grain which remained in the hold absorbed

(1) (1872) L. R. 3 A. & E. 556.
(2) Lush. 476.
(3) [1923] P. 155.

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water. The *Portreath* sent out wireless signals and a tug arrived and stood by for some hours. About daybreak the master noticed that his vessel was getting a list to port, and he thought also that she was getting more down by the head. Thereupon, he gave orders to abandon ship and was taken on board a pilot cutter with his crew. A short time afterwards he realized that his apprehensions were not justified and called for volunteers to return to the ship. Sixteen out of the twenty-eight members of the crew elected to follow the master back on board the *Portreath* and assisted in the ultimate preservation of ship and cargo. Eight out of these sixteen volunteers claimed as salvors. Hill J., after shortly reviewing the cases, held that the volunteers were not entitled to salvage on the ground that the circumstances were not such as to put an end to their contract of service. He said (1): "In my view it would be most dangerous to regard seamen, "owing a duty under a contract, as entitled in such circum-"stances to convert themselves into salvors, and I have come "to the conclusion, dealing with the case without any reference "to the authorities, that there is no justification for saying "that there was anything which determined the plaintiffs' "contract of service." After citation from several of the cases I have quoted here, he concludes his judgment with these words: "In my view when one finds a master giving "orders to his crew to abandon ship and go on board another "vessel because he thinks his ship is sinking, and then within "a short time, on maturer judgment, he arrives at the con-"clusion that the ship is not sinking, there is no foundation "for saying that there was any final abandonment of the "ship. There was no dissolution, no determination of the "contract of service. The fact that the master called for "volunteers instead of ordering the crew to go back appears to "me to have no bearing on the question." From this last passage it is, I think, clear that the learned judge intended to find that the abandonment, such as it was, was not made sine spe revertendi. It is also pertinent to the present case, which I have to consider, that he entirely declines to accept

(1) [1923] P. 158.

the fact of a voluntary return as decisive of the major question whether the contract was ever really terminated.

It remains to apply the principles which are to be collected from these cases to the facts of the present case. Mr. Hayward argued, first, that there was a constructive abandonment of the ship by the action of the master in leaving the vessel in the circumstances, and that this abandonment dissolved the contract between the plaintiff and the owners of the *Albionic*. Alternatively, if the master's action did not amount to a constructive abandonment, the order given by him to the party remaining on board to jump into the water was in itself a direct order to abandon and constituted a dissolution of the contract. Furthermore, he contended that in any event, since the chief officer had given the plaintiff the option of leaving the vessel and must be taken as acting for the owners in that regard, the contract was thereupon dissolved, and any subsequent work performed by the plaintiff which contributed to the vessel's safety should be regarded and rewarded as a salvage service.

Taking the third of these points first, it appears to me that it is disposed of by the last sentence which I have quoted above in the judgment of Hill J. in *The Portreath* (1). Indeed, the mere fact that the master or other person in charge of a vessel offers an option to members of the crew to leave or stay with the vessel cannot by itself be the test of whether a sailor's contract is ended. At the highest it is only an option to continue or discontinue the contract of service, but one must look carefully at the circumstances to see whether it even amounts to so much. The word "volunteer" is not entirely free from ambiguity. Could it be contended, for example, that on any occasion on which the master of the ship calls for volunteers for a specially dangerous duty the contract of service is thereby instantly dissolved with regard to those who answer the call? In *The Portreath* (1), Hill J. clearly thought that the act of volunteering for the return to the ship in no way altered the original contract. In the present case, seeing that, at the time when the election was made, the

(1) [1923] P. 155, 158.

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Albionic had already come to anchor and the worst of the conflagration had subsided, I cannot think that the act of volunteering to remain, meritorious as it certainly was, made any change in the legal relationship between the plaintiff and his employers. I would recall here a sentence which I have already quoted from Dr. Lushington in *The Florence* (1) : "In shipwreck the contract continues so long as a plank can "be saved."

Turning now to the first point, I do not quarrel with Mr. Hayward's phrase "constructive abandonment." Obviously there is no set form or sacrosanct ritual to constitute abandonment. If a vessel is so badly damaged that she is likely to founder in a matter of moments and the master and crew leave her with one accord at the best possible speed, no one could be heard to say that she was not truly and completely abandoned merely because no actual order to abandon was given by the master. Sir Robert Aske argues that abandonment is, and must always be, a question of fact. This is true, but true only in the same sense as it can be said that negligence is a question of fact. It is a pure question of fact whether A. B. sounded or did not sound his horn, but whether the failure to sound it amounts in the circumstances to negligence depends on the standard of care appropriate to those circumstances. If the circumstances have occurred before, there will be a precedent to guide the court. If not, the court will have to lay down the standard which it considers appropriate. In either event there is, to my mind, matter of law, either old law followed, or new law made.

Applying this line of thought to the matter in hand, there are certain questions of pure fact as regards the leaving of the vessel which fall to be determined in the first instance. When they have been ascertained it becomes necessary to decide whether those facts fall on one side or the other of the line which has been laid down by precedents as amounting to an abandonment sufficient to dissolve the seaman's contract. As I conceive it, therefore, the question in each case must be whether the facts warrant

(1) 16 Jur. 573.

the inference in law that the vessel was abandoned. For this purpose it must be steadily borne in mind also that abandonment here connotes the leaving of the vessel sine spe revertendi, made in good faith and to save life on the order of the master or person in charge. In my view, the circumstances of the present case do not warrant the necessary inference. I do not think that the captain ever formed any direct, clear or immediate intention of leaving the *Albionic* at any given moment. He certainly never gave any direct order to that effect to the ship's company, and I am satisfied that the lifeboats of the *Albionic* were never cast off by his or by anybody else's order, but were in fact broken or drifted away from the ship's side.

As to the second point, that the master ordered the crew to jump, I take the view that this order was a most imprudent one, and that it was given by the master at a moment when he was not at all well qualified to estimate the danger of the advice which he was giving. It was, in fact, advice rather than command, and was not only countermanded by the chief officer then in charge of the *Albionic*, but was not followed by the plaintiff or by any member of the ship's company. The idea, much insisted on by Mr. Hayward, that an injunction of this kind from the master of a vessel automatically dissolves the contract, finds no support in the judgment of Hill J. in *The Portreath* (1). If it were sound law the contract of the disappointed plaintiffs in *The Portreath* (1) must have been dissolved before the option of volunteering was ever presented to them. Furthermore, even if it could be said that the master's leaving of the vessel in the present case amounted to an act of abandonment, which in my view it did not, I am unable to see how that leaving could be said to have been sine spe revertendi. I am, accordingly, bound to dismiss the plaintiff's claim.

Had the matter been open to me for assessment I should have regarded the services of the party which remained on board as worthy of a total award of 2000*l*. Taking the rating

(1) [1923] P. 155.

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of the plaintiff as between the second and third officers, this would mean an award to him of about 200*l.*

Judgment for defendants.

Solicitors for the plaintiff: *Ingledew, Brown, Bennison & Garrett, for Lean & Lean, Cardiff.*

Solicitors for the defendants: *Botterell & Roche.*

E. C. M. T.

IN THE ESTATE OF J. KING SPARK (DECEASED).

1941
July 15.

Probate—Nuncupative will—Soldier "in actual military service"—Killed by enemy bomb in camp in England—Dental Corps officer killed while living at home—Wills Act, 1837 (7 *Will.* 4 & 1 *Vict. c.* 26), *s.* 11.

While serving in the Army in camp in England in time of war, a soldier made an oral declaration to a comrade that he wished all he had to go to his wife if he were killed. Two days later, while in the camp, he was killed by a bomb dropped by the enemy during an air raid :—

Held, that the soldier was "in actual military service" within the meaning of s. 11 of the Wills Act, 1837, when he made the declaration which, therefore, constituted a privileged will.

But an officer in the Army Dental Corps who performed his duties at command headquarters and lived at home where he was killed by an enemy bomb :—

Held, not to be a "soldier . . . . in actual military service" within s. 11. (See note, p. 116 post.)

MOTION for a grant of administration with a nuncupative will annexed.

The application was made on behalf of Mrs. Constance King Spark for a grant of letters of administration of the estate of her husband, John King Spark, a private soldier, with the contents of a nuncupative will, dated August 5, 1940, annexed.

The soldier was a member of the Territorial Forces and was mobilized on September 1, 1939. He saw his solicitor on that day and gave instructions for his will, but he never executed a will in accordance with section 9 of the Wills Act, 1837, although he was granted leave from time to time and spent it at home with his wife, his solicitor practising a few miles away. In August, 1940, his battalion was in camp at a place in Great Britain and on August 5, while he was in camp, he said to another soldier: "I wish my wife to have "all I have in case I get killed." On August 7, enemy aircraft dropped bombs on the camp and the soldier received a wound from which he died on the following day. Before he died, he referred to the will which he had declared in favour of his wife.

G. C. Tyndale and *C. O. Herd*, for the applicant, cited *In the Goods of Hiscock* (1); *Gattward* v. *Knee* (2); *Stopford* v.

(1) [1901] P. 78, 82, 85. (2) [1902] P. 99.

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SPARK (J. KING), IN THE ESTATE OF.

Stopford (1); *In the Estate of Gordon* (2); *In re Wernher* (3); *In re Stable. Dalrymple* v. *Campbell* (4); *In re Kitchen. Kitchin* v. *Allman* (5); and *In the Estate of Gibson* (6).

HODSON J. This motion raises a point of some importance. The deceased was a soldier who died in this country on August 8, 1940, as the result of a mortal wound received on August 7, 1940. He had previously made a statement which is set up as a nuncupative will and is relied on as being a privileged will by virtue of s. 11 of the Wills Act of 1837 (7). The words which I have to consider are "in actual military service."

There is no doubt that the words of the statement set up as a will are sufficient to satisfy the necessary testamentary qualifications of a will, provided that the soldier was in a position to have the benefit of the privilege. There are phrases in some of the old cases which lay emphasis on the reason for the soldier's privilege being given, it being that a soldier in expeditione, or in actual military service, is usually inops consilii. He has not as a rule the opportunity of drawing up a will with the necessary formalities, or of obtaining legal advice. The soldier in the present case had every opportunity of having legal advice, and he was not in any sense inops consilii. He was in England, and he was in touch with his solicitor. He had given instruction to his solicitor to prepare his will, and, if he had chosen to spend part of his leave with

(1) (1903) 19 Times L. R. 185.
(2) (1904) 21 Times L. R. 653.
(3) [1918] 2 Ch. 82.
(4) [1919] P. 7.
(5) (1919) 35 Times L. R. 617.
(6) Reported as a Note to this case.
(7) By Wills Act, 1837, s. 11: "Any soldier being in actual "military service . . . . may "dispose of his personal estate as "he might have done before the "making of this Act."

Before the Statute of Frauds, 1677 (29 Car. 2, c. 3), anyone in England could make a will of personalty by declaration or unattested writing. Limitations were imposed on such nuncupative wills by that Statute, but s. 23 provided that "any soldier being in actual "military service, or any mariner "or seaman being at sea, may "dispose of his moveables, wages "and personal estate, as he or they "might have done before the "making of this Act." This was replaced in the Wills Act, 1837, s. 11. The Wills (Soldiers and Sailors) Act, 1918, extended this privilege of nuncupative wills to a devise of real property.

the solicitor, he could have completed the testamentary act on which he had started, but he did not do so. Although, however, it is no doubt true that the basis of the privilege is the fact that a soldier has not, as a rule, got a solicitor at his elbow, it does not, to my mind, really assist very much in deciding whether a soldier is in actual military service or not. I see that that aspect of the matter was discussed in *In the Goods of Hiscock* (1), where Sir Francis Jeune P. said: "I quite agree that it is not right to consider, in "individual cases, whether the person whose will is in question "was inops or not; because there might be cases where a man "could not be said to have been inops but who would yet come "within the words of the Act," and he proceeds to give an illustration of a case of that kind.

I have been referred to cases which were decided during the last war and the Boer war, and some older cases, and I have been referred to one decision which was given during this war. Some of the cases seem to indicate that importance should be attached to the actual orders received by the soldier at a particular moment. For instance, in several cases it was held that a soldier in England during the last war who was under orders to go overseas was in actual military service, the inference being that if he had not been under orders to proceed overseas, the court might, at any rate, have found considerable difficulty in allowing that the privilege would lie. It is, however, quite clear that in the present war the extent of military operations has been very much enlarged, in depth and in height, and that circumstances are different now from those which existed in earlier wars. The scope of military operations is very much larger, and it seems to me that a soldier who is in camp (even though he is in England and not under orders to proceed overseas) is thereby a mark for enemy action and is in a position in which he is "in actual military "service" within the meaning of the section just as if he were engaged with the enemy in such circumstances as, no doubt, were envisaged by those responsible for the drafting of the Wills Act, 1837.

(1) [1901] P. 78.

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SPARK (J. KING), IN THE ESTATE OF.

Accordingly, I find that this will, in the form I have stated, namely, "I wish my wife to have all I have in case I get "killed," is entitled to be admitted as having been made on August 5, 1940, by the deceased while a soldier in actual military service.

Order in terms of motion.

Solicitors: *Brooks, Davidson & Bartley.*

W. L.

No longer of authority. Re WINGHAM *(decd.).* [1948] 2 All E.R. 908.

NOTE.

Overruled. In re WINGHAM, DECD. [1949] P. 187

IN THE ESTATE OF GIBSON (DECEASED).

Cor. Henn Collins J. Feb. 19, 1941.

On this motion for a grant of letters of administration with a will annexed of the estate of Lieutenant-Colonel Arnold Gibson, of the Army Dental Corps, a testamentary paper not duly executed in accordance with the provisions of the Wills Act, 1837, was put forward as a soldier's will under s. 11 of that Act. The writing was in the form of a holograph will, purporting to leave all that Colonel Gibson possessed to his sister, but it was unsigned. Colonel Gibson was killed when his house was destroyed by an enemy bomb in October, 1940. He was then attached to district command headquarters some miles away, but he lived at home. The application was made by his sister, his mother consenting.

Victor Williams for the applicant. At the material time the deceased was "in actual military service," within s. 11 of the Wills Act, ~~1937~~. In this war this country is just as much a battle zone as many places abroad. It was being invaded by air and the deceased was just as much "in actual military service" as if under orders to proceed abroad to a campaign. The nearest analogy is perhaps to be found in *In the Goods of Hiscock* [1901] P. 78.

HENN COLLINS J. said that it would be going against the principle laid down in the authorities to grant the motion. He could understand the privilege granted by s. 11 of the Wills Act, ~~1937~~, being extended to a soldier in England who had been mobilized for service abroad or ordered to go to a certain place for embarkation, but a man who was carrying out professional, peace-time duties, although he was under military authority, was no more a fighting soldier because he was in the army than an ordinary civilian, who, in the circumstances of the present war, might be said to be in the front rank of the fighting. The foundation of the rule was that a man was uprooted from civil surroundings and the deceased never was. In *Bowles* v. *Jackson* (1854) 1 Spinks, Ecc. & Ad. 294, a soldier under orders to proceed from his station in one Indian presidency to take part in the war going on in another, and making his will only two days before he commenced the march, was held not to be entitled to the privilege of a military testament.

Motion dismissed.

Solicitors: *Gregory, Rowcliffe & Co., for Henry F. Galpin, Oxford.*

W. L.

DUPUIS *v.* PARISHIONERS OF OGBOURNE ST. GEORGE.

1941
July 23.

ON APPEAL FROM THE CONSISTORY COURT OF SALISBURY.

Ecclesiastical law—Faculty—Memorial inscription in parish church—Prayers for the dead—"Of your charity pray for the soul of"—Discretion of ordinary.

The granting of a faculty for the erection of a tablet in a church is never a matter of right, but always one of privilege, and it is a privilege which should be sparingly conceded. It, therefore, behoves those who ask for such a privilege to be careful to see that there is nothing in what they propose which might cause offence to others. If there is any doubt about that, the proposals should be modified.

D. petitioned for a faculty for the erection in a parish church of a memorial tablet to the memory of her husband, bearing the inscription "Of your charity pray for the soul of C. G. D. . . . ." There was no parish opposition, and the inscription had been approved by the parochial church council, but the chancellor, in the exercise of his discretion, refused the faculty. On appeal to the Court of Arches :—

Held, that the words of the proposed inscription were commonly associated with the Roman Catholic doctrine of purgatory, and they would, therefore, be likely to offend many members of the Church of England, and that, in view of that probability, there was no reason for interfering with the exercise by the chancellor of his discretion.

APPEAL from a refusal by the consistory court of Salisbury of a faculty for the erection of a memorial tablet.

The petitioner, Mrs. Dupuis, prayed the court to grant a faculty for the erection, on the north wall of the chancel within the parish church of Ogbourne St. George, of a stone tablet to the memory of her husband, bearing the following inscription: "Of your charity pray for the soul of Charles "George Dupuis, C.B.E., of the Sudan Political Service, "born January 10, 1886, died April 13, 1940, sometime "churchwarden of this parish." There was no parish opposition to the grant of the faculty, and at a meeting of the parochial church council of the parish held on July 30, 1940, it was unanimously agreed "that a tablet to the memory of Charles "George Dupuis be erected on the north wall of the chancel,

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"the wording to be that chosen by Mrs. Dupuis." The Salisbury Diocesan Advisory Committee, however, while approving the design for the tablet, did not approve of the inscription, and the chancellor came to the conclusion, in the exercise of his discretion, that the words "Of your charity pray for the soul "of . . . ." ought not to be allowed. He, therefore, refused the faculty and Mrs. Dupuis appealed.

Macmorran K.C. and *J. L. Poole* for the appellant. Prayers for the dead are nowhere forbidden in the Church of England: *Breeks* v. *Woolfrey* (1); *Rector and Churchwardens of Capel St. Mary, Suffolk* v. *Packard* (2); *Bourne* v. *Keane* (3); although, perhaps, the Church discourages them: *Egerton* v. *All of Odd Rode* (4). The last-named case, where an inscription similar to the one in question was disapproved, was wrongly decided. It is only where the inscription is connected with the Roman Catholic doctrine of purgatory that it is objectionable, as in *Pearson* v. *Stead* (5). There the deceased and the promovent were Roman Catholics, there was strong Protestant opposition in the parish, the approving minority were mostly Roman Catholics, and the inscription was admittedly intended to have a Roman Catholic interpretation. The words here have no necessary connection with the doctrine of purgatory. There is, moreover, no parochial opposition, and the chancellor should have concerned himself, not with the views of devout Christians generally, but only with those of the parishioners. If this formula, "pray for "the soul of," is admitted, the introductory words "of your "charity" are harmless and mean only "out of the kindness "of your heart."

The respondents did not appear.

THE DEAN OF ARCHES. In my opinion, this case does not raise any question of law. Mr. Macmorran and Mr. Poole said all that could be said on behalf of their client, but most

(1) (1838) 1 Curt. 880.
(2) [1927] P. 289, 306.
(3) [1919] A. C. 815, 898.
(4) [1894] P. 15.
(5) [1903] P. 66.

of the argument (and I was in entire agreement with that part of it) was directed to justifying the use in the Church of England of prayers for the dead.

The real question, I think, is merely one of discretion, namely, whether the words "Of your charity pray for the "soul of . . . ." ought to be sanctioned. It is perhaps noteworthy that there are only two reported cases dealing with words at all similar to the words now proposed: *Egerton* v. *All of Odd Rode* (1), and *Pearson* v. *Stead* (2); and that in both those cases the discretion of the chancellor was exercised against allowing them. I do not want to lay too much stress on that. This case is different from that of *Pearson* v. *Stead* (2) because here there is no hint of any parochial opposition; but, as I pointed out in the course of the argument, it is difficult for the parochial church council of a small country parish to stand out on a matter of this kind, even if they wish to. Too much weight must not, therefore, be given to the resolution of the council.

The formula which Mrs. Dupuis wants to use as the opening words of this inscription is commonly used for inscriptions in the Church of Rome, when it would naturally be associated with the Roman Catholic doctrine of purgatory. It is truly said that the words have no necessary connection with that doctrine, but they are most commonly associated with it, and, therefore, although to some minds they may appear quite harmless, I have no doubt that there are many members of the Church of England, and those not only the unlearned and ignorant, to whom they would be a cause of offence. To my mind a governing consideration in this case is that the granting of a faculty for the erection of a tablet in a church is never a matter of right, but is always one of privilege, and it is a privilege which should be sparingly conceded. I think, therefore, that it behoves those who ask for such a privilege to be careful to see that there is nothing in what they propose which might cause offence to others. If there is any doubt about that, the proposals should be modified. Here you have the opinion expressed by the advisory committee, and a

(1) [1894] P. 15. (2) [1903] P. 66.

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The Dean of Arches.

letter from the archdeacon in which he says: "This form will "not be approved [i.e. by the advisory committee]. I think "the reason is that such a form has long been out of use and "is no longer natural to English folk. I hope Mrs. Dupuis "will not mind and will substitute other wording."

On the whole, therefore, I can see no reason for differing from the conclusion reached by the learned chancellor in the exercise of his discretion. It was incumbent on the appellant to show that that discretion had been exercised wrongly, and I do not think that that has been shown. The appeal will be dismissed.

Solicitors for appellant: *Evill & Coleman.*

W. L. L. B.

END OF VOL. AND OF PROBATE SERIES FOR 1941.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1941, will be as follows:—

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